(25,399)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 569.

CITY OF COVINGTON, APPELLANT,

vs.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at Covington, Kentucky, at a regular term begun and held in the Federal Court Hall, in the City of Covington, on Monday, April 3, A. D. 1916, and of our Independence the 140″ year.

Court Met:
Present: Hon. A. M. J. Cochran, Judge.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Kentucky, Plaintiff,
v.
THE CITY OF COVINGTON, a Municipal Corporation under the Laws of Kentucky, Defendant.

Bill in Equity.

Filed September 25, 1913.

United States District Court, Eastern District of Kentucky.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Kentucky, Plaintiff,
v.
THE CITY OF COVINGTON, a Municipal Corporation under the Laws of Kentucky, Defendant.

2 Plaintiff is a corporation organized under a special charter of the Commonwealth of Kentucky, and defendant is a municipal corporation of the second class under the laws of Kentucky, and located in the said Eastern District of Kentucky.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand ($3,000.00) dollars, and arises under the constitution of the United States, in the manner hereinafter set forth.

Plaintiff's said charter is an act of the General Assembly of the Commonwealth of Kentucky, approved June 25, 1876, entitled "An Act to Incorporate the South Covington and Cincinnati Street Railway Company": by the said act of incorporation, the South Covington and Cincinnati Street Railway Company was created a body politic and corporate, with perpetual succession and power to construct, own, hold, operate and maintain a line or lines of street railway in the said City of Covington and in the vicinity thereof, along and over such streets and public ways in said city as the City Council should grant the right of way to plaintiff: by the terms of said charter defendant was expressly authorized and empowered to grant to plaintiff the right of way over all the streets and public ways of said city and to agree to the grade for the street railway tracks.

Plaintiff was by said charter expressly authorized and empowered, in case the right of way from said defendant could not be obtained by agreement satisfactory to the said street railway company, to exercise the right of eminent domain and condemn the right of way on and over said streets and public ways, within the limits of the said city.

3 Defendant by ordinance dated December 13, 1869, and by agreement entered into on the 23rd day of December, 1869, between the City of Covington, party of the first part, and E. F. Abbott, S. J. Redgate, and J. C. Blick, their associates, successors and assigns, parties of the second part, in pursuance of said ordinance, granted to said parties of the second part the right in perpetuity to construct, hold, operate and maintain a street railroad upon and along Scott Street from Fourth Street to Sixteenth Street: thence along and upon Sixteenth Street to Stevens Street: thence along and upon Stevens Street to Austin Street. Also, commencing at the intersection of Scott and Fourth Streets: thence along Fourth Street to Bakewell Street: thence south on Bakewell Street to Riddle Street: thence west on Riddle Street to Philadelphia Street: thence south on Philadelphia Street to Lexington Pike: all of said streets being streets within the corporate limits of the defendant.

Defendant by ordinance of its duly authorized City Council passed on December 28, 1874, conferred upon said Abbott and his associates, successors and assigns, the right and privilege of constructing, holding, operating and maintaining a street railway on and over the streets mentioned and set out in said agreement of December 23, 1869: and modified the second route granted by said agreement of December 23, 1869, so that said route should extend over the following streets, to wit: beginning at the corner of Fourth Street and Scott Street in the City of Covington, thence west on Fourth Street to Main Street, south on Main Street to Pike Street: east on Pike Street and crossing Madison Street to Cooper Street: thence

4 to Scott Street: and north on Scott Street to the beginning.

Defendant through its Council, by ordinance passed January 28, 1875, granted to the said E. F. Abbott, his associates and assigns, the right and authority to construct and operate a line of street railway, within defendant's corporate limits from Fourth Street north through Market Street and the alley north through to and across Second Street with necessary turnouts to make connection between the tracks crossing the Suspension Bridge (i. e. a general traffic bridge crossing the Ohio River between the Cities of Covington, Kentucky, and Cincinnati, Ohio) and those traversing Fourth Street, said track to enter the center of said street and alley, and to be constructed after the same manner as the track along other streets which said Abbott, associates and assigns, were authorized to construct.

Said E. F. Abbott and his associates to whom the right aforesaid was so granted by defendant, organized themselves into a body politic and corporate and became incorporated by a special act of the General Assembly of Kentucky, under the corporate name of the Covington and Cincinnati Street Railway Company, with the right of

perpetual succession and the right and power to hold, construct, operate and maintain street railways in the City of Covington and vicinity.

On the 1st day of May, 1878, E. F. Abbott and his associates, by due conveyance, properly recorded, sold, conveyed, assigned and transferred to the said Covington and Cincinnati Street Railway Company the said contract of date December 23, 1869, and
5 all and singular the rights, grants, privileges, conferred upon them or granted by them by the defendant by said ordinance of December 13, 1869, and by said contract of December 23, 1869, and by the ordinances subsequently thereto passed by the City Council of the defendant as hereinbefore set out.

In pursuance of the provisions of the said contract and ordinances, the Covington and Cincinnati Street Railway Company constructed a line of street railway on and over said routes and continuously maintained, held and operated the same until the 20th day of December, 1876, when by a duly executed conveyance of that date it sold, conveyed and transferred all of said tracks and all and singular rights, privileges and franchises to own, hold, construct and operate lines of street railways on and over the streets hereinbefore mentioned, together with all its property of every kind, to plaintiff, and all of said assignments were made with the knowledge of the defendant and have been acquiesced in and ratified by defendant.

Defendant, through its duly authorized City Council, by ordinance duly passed October 13, 1881, provided that:

Whereas, The South Covington and Cincinnati Street Railway Company has laid and is now using a single railway track in the alley running from Third Street north to the Covington and Cincinnati bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track which it is believed will promote the interest of the general public, therefore:

Be it ordained by the City Council of Covington that The South Covington and Cincinnati Street Railway Company and the
6 same is hereby authorized to lay a double track on said proposed avenue from Second Street to Market space so as to make connections with its track as now laid on Market space and Market Street and to use and enjoy the same as well as its tracks on Fourth and Scott Streets upon the same terms and conditions as it is authorized to use and enjoy the remainder of its tracks by provisions of a certain agreement entered into by E. F. Abbott and the City of Covington on the 23rd day of December, 1869.

Under and by virtue of the ordinances and grants from the defendant as hereinbefore set out and under and by virtue of its said charter, plaintiff became duly invested in perpetuity with the right to construct, own, hold, operate and maintain a system of street railway on and over said streets, in said contracts and ordinances set out, and from and after the assignment to it by the Covington and Cincinnati Street Railway Company, of its grants, rights and privileges as hereinbefore set out, plaintiff took possession of the said streets and all of them and has continuously operated, owned, maintained and operated lines of street railway thereon: plaintiff

has, at great expense, constructed and re-constructed, equipped and repaired said lines of street railway on said streets and has exclusively operated said lines of street railways on and over said streets from the date of the said assignment to it up to the filing of this bill and now owns and is operating the same.

Prior to the granting to E. F. Abbott and his associates or to plaintiff, of any of the rights and privileges to construct, hold and operate street railway lines on the streets as hereinbefore set out, the
7 defendant, through its duly authorized City Council, granted by contract and agreement of date August 15, 1865, to another corporation then existing, The Covington Street Railway Company, the right to lay its tracks and operate a line of street railway on and over certain streets within the corporation limits of the city of Covington, to wit:

Greenup Street Route, or No. 1.

Commencing corner of Scott and Front, running south to Third, east on Third to Greenup, south on Greenup to Powell, west on Powell to Madison, ret-ur-ing over the same route to Third Street: continuing north on Greenup to Second, west on Second to Scott, to same place of starting to be a single track route, without turnouts at following intersections of streets with Greenup, Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

Madison Street Route, or No. 2.

Commencing corner Scott and Front Streets, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line, a double track on Madison from Eighth to Third, turnouts at the following intersections of streets with Madison: Robins, Twelfth, Fourteenth and Fifteenth Streets.

Pike and Banklick Streets Route, or No. 3.

Running over the Madison Street Route to Sixth Street, west on Sixth to Washington, south on Washington to Pike, west on Pike to Banklick, south on Banklick to Fifteenth Street, east on Fifteenth street to Madison, a double track on Pike from Banklick to Washington, on Washington to Sixth and on Sixth to Madison
8 and turnouts at the following intersection of streets with Banklick: Eleventh, Thirteenth and Fifteenth Streets.

Main Street Route, or No. 4.

Running over that portion of the Madison Street Route from the corner of Front and Scott Streets to Third and Madison, west on Third to Main, south on Main to Pike, west on Pike to York, a single track with turnouts at the following intersection of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York returning over the same route.

Third Street Route, or No. 5.

Running over the Main Street route to Main, west on Third to Bullock, south on Bullock to Second, returning over the same route, single track, with turn-outs at the intersection of the following streets with Third: Philadelphia and Bullock.

Said grant to said Covington Street Railway Company was for a period of twenty five years from and after the date of said agreement, to wit: from and after the 15th day of August, 1865.

Defendant, by its duly authorized City Council, on the 8th day of June, 1882, by ordinance duly passed, and which said Council had full power to pass, authorized plaintiff to contract with said Covington Street Railway Company for the right of way over and along the streets specified in the contract between the Covington Street Railway Company and the City of Covington, dated August 15, 1865, as hereinbefore set out, and the consent of the said
9 Company having been obtained, plaintiff was by the terms and provisions of said ordinance authorized to occupy and use said streets specified in said contract for street railway purposes, subject to the same conditions, limitations and restrictions contained in the ordinances and agreements regulating plaintiff's right to the streets at that time occupied by it: all of which ordinances and agreements were without limitations as to time, and were in perpetuity.

In consideration of the privileges conferred upon plaintiff by the said ordinance of June 8, 1882, it was provided therein that plaintiff should remove its track from Park Place and Court Avenue and forever relinquish its right to maintain its tracks on said Park Place and Court Avenue.

Plaintiff accepted the terms and conditions of said ordinance in the time and manner therein prescribed for its acceptance.

On or about the — day of July, 1882, plaintiff contracted with the said Covington Street Railway Company for the right of way over and along the streets specified in the contract between the said Company and the City of Covington, of date August 15, 1865, and purchased the same in pursuance of the terms of said ordinance of June 8, 1882, and as a consideration for the perpetual rights and privileges granted in said ordinance of June 8, 1882, it removed its track from Park Place and Court Avenue and forever relinquished the right to maintain a street railway track on and over said Park Place and Court Avenue.

By the removal of its track from said Park Place and Court Avenue and by forever relinquishing its right to maintain
10 its tracks on said Park Place and Court Avenue, it surrendered its only means and way of approach for its cars to the Suspension Bridge over the Ohio River, between Covington, Kentucky, and Cincinnati, Ohio, excepting by and over the lines secured by it, with the consent of the defendant from said Covington Street Railway Company.

By virtue of its purchase from the said Covington Street Railway Company, made with the consent of the defendant and by virtue

of the ordinance of June 8, 1882, hereinbefore set out, and for the considerations aforesaid, as provided in said ordinances, the South Covington and Cincinnati Street Railway Company became possessed in perpetuity of the right to construct, operate and maintain a line of street railway on and over the streets, and each and all of them, specified in the contract between the Covington Street Railway Company and the City of Covington, of date August 15, 1865, being hereinabove described as routes numbered one to five inclusive.

On and since taking possession of the rights of said streets so acquired from the said Covington Street Railway Company and relying upon said purchase and the ordinance authorizing said purchase, the said South Covington and Cincinnati Street Railway Company at great expense has reconstructed the said tracks on said streets, and laid tracks on other of the said streets, on and over which the said Covington Street Railway Company had not laid tracks, and has equipped said tracks and lines at great expense, and has continuously operated street cars on and over the same since the date of the said purchase from the Covington Street Railway Company and the acquiring of the said perpetual rights from the City of Covington as aforesaid, and is now operating the same.

11 Defendant, acting through its City Council, did on the 11th and 18th day of September, 1890, by resolution, wrongfully declare that the right of plaintiff to operate and maintain a street railway on and over the streets specified in said routes numbered one to five aforesaid, had expired and terminated and did unlawfully direct by said resolution that the right to operate such street railway on and over said streets should be taken away from plaintiff and be offered for sale to the highest bidder at public auction.

Thereupon plaintiff brought its suit in equity in the United States Circuit Court for the District of Kentucky to enjoin the said action so proposed by defendant and a temporary injunction was granted by said court pending the final hearing of said cause.

Before said cause was finally heard plaintiff and defendant entered into an agreement embodied in an ordinance of the Common Council of the City of Covington approved October 7th, 1892, and accepted by plaintiff, whereby the defendant agreed, in consideration of certain acts to be done by plaintiff, to postpone the enforcement of any of its claimed rights to sell any of the franchises of said plaintiff for a period of twenty years from and after the acceptance of said ordinance, on the understanding and agreement therein expressed that nothing in said ordinance should be held or construed to be a surrender or waiver of or to prejudice any of the rights or claims of either said City or Company.

In consideration of the terms of said agreement plaintiff substantially reduced its fares and agreed to make certain changes in the routes of its cars and extensions of tracks upon certain

12 routes therein specified, to relay tracks to remove tracks from certain streets to certain other streets to electrically equip and operate all routes with modern electric cars and appliances, to pay to defendant certain sums of money semi-annually and to dedicate to it and open for public use a portion of Sixteenth Street.

Plaintiff complied with all and singular the conditions and obligations of said ordinance and in so doing has spent large sums of money, to wit: more than a million dollars.

On or about the 11th day of July, 1901, defendant by ordinance of its General Council approved on said date, requested the plaintiff to change its tracks and the operation of its street railway lines from a portion of Second Street between Scott and Greenup Streets, from Greenup between Second Street and Park Place and from Scott Street between Second Street and Park Place, to Court Street and Park Place. Said defendant also desired in connection therewith to widen Court Street on the east side thereof between Third Street and Park Place and for said purpose required a certain strip of land then and there belonging to plaintiff, lying twelve feet deep along the eastern side of Court Street between Third Street and Park Place. Plaintiff assenting thereto, it was ordained that plaintiff be authorized to lay double tracks and to construct, operate and maintain its street railway line from its tracks on the Suspension Bridge over and across Second Street to the center of Court Street, thence along and over the center of Court Street to Park Place and single track over and upon Park Place between Scott and Greenup Street. It was further ordained that plaintiff should within a reasonable time remove its tracks from said portions of Greenup Street
13 and Scott Street and replace said streets in good condition and order. Said rights were granted to plaintiff in consideration of the benefits to the City of Covington of said change of routes and in consideration of the conveyance by the plaintiff of said strip of land to the defendant. Said grants were made to plaintiff on the same terms and conditions and for the same period of time as its other grants in the City of Covington above set forth herein.

Said ordinance was duly accepted by plaintiff said strip of land was duly conveyed by it to defendant and accepted and used for street purposes by defendant, said railway tracks and the operation of said street railway line were removed from said streets as ordained and stipulated in said ordinance and the said railway tracks were constructed on said Court Street and Park Place in acordance with the terms of said ordinance and a street railway line has been operated thereon ever since said time.

Relying upon its rights and franchises in the City of Covington hereinabove described, plaintiff is now engaged in the through operation of cars from points in Cincinnati, Ohio, to points in Covington, Kentucky, and Newport, Kentucky, whereby passengers are transported in inter-city and inter-state commerce between said points for one fare and without change of cars.

Defendant by ordinance approved July 14, 1913, provided for the letting at public bidding of a franchise for entering in and upon all its streets upon which plaintiff has grants as aforesaid and other streets upon which plaintiff is rightfully operating street rail-
14 way lines, for the purpose of constructing, operating and maintaining street railway lines thereon for the term of twenty years: by the terms of said ordinance bids were to be received by the City Clerk of the defendant on the day of the first

meeting of the General Council ten (10) weeks after the first publication of said ordinance and said City Clerk advertised that he would receive bids under said ordinance between the hours of nine o'clock A. M. and five thirty o'clock P. M. on the 26th of September, 1913.

Under the terms of said ordinance any bids so received on said day will be submitted to the General Council for its acceptance of rejection. If no bids are received on said day, or if bids are received and rejected, defendant, through its officers, will re-advertise the sale of said franchise under the terms of said ordinance.

Defendant claims that the grants and rights of plaintiff as hereinbefore described, have expired and denies its rights to further occupy the streets of the City of Covington with its rails and equipment and to operate its street railway lines thereon, and in advertising said franchise for sale under said ordinance of July 14, 1913, and in seeking and receiving bids thereunder, defendant intends and proposes to grant to another the right to maintain and operate street railway lines over the streets now occupied as aforesaid by plaintiff and to exclude plaintiff from further operation of its lines thereon to the irreparable damage of plaintiff and in contravention of its contract rights as aforesaid.

The operation of street railway lines by a grantee under said ordinance over and upon the streets therein set forth would pre-
15 vent the operation by plaintiff of its lines thereon and would be not only an impairment but a destruction of plaintiff's rights as aforesaid on said streets, as it is impossible that tracks, poles, wires and equipment for the operation of a street railway, other than those of plaintiff can be placed and used, and that electric cars other than plaintiff's could be operated on said streets without their practical destruction as thoroughfares for public travel.

Defendant, through its officials, has made and is now making repeated attacks upon the property rights of plaintiff and upon its rights to own and operate lines of street railway on and over said routes in Covington, and has publicly and openly declared that plaintiff has no legal right to operate its lines of street railway on and over said routes, or any of them, and has openly and publicly declared, and is still declaring, its intention to oust plaintiff from said rights. The sole purpose of the passage of said ordinance of July 14, 1913, and the receipt of bids thereunder is to grant to another the right to operate street railway lines on said streets now enjoyed by plaintiff and to forever and entirely exclude plaintiff from the enjoyment of the same or any of them.

Plaintiff has never in any way consented to the passage of said ordinance or to any of said wrongful and unlawful acts of defendant but has continuously protested against the same and has at all times claimed, to the knowledge of defendant, that it has the right in perpetuity to operate its street railway lines over and upon said streets and that any grant to another, such as that under said ordi-
16 nance of *of* July 14, 1913, would not only be an impairment but a destruction of its rights as aforesaid.

The acceptance of any bids under said ordinance or any further

advertisement for bids thereunder, would be a cloud upon plaintiff's title to its grants as aforesaid: would irreparably damage it in its said inter-state and inter-city business: would result in vexatious litigation, multiplicity of suits and interruption and impairment of the public service in the carriage of passengers furnished by plaintiff in Covington and elsewhere, to the irreparable damage of plaintiff and to the inconvenience and damage of the public.

The proceedings, acts and conduct of the defendant, by its Council and officers, in passing said ordinance of July 14, 1913, and receiving bids thereunder and in proposing to accept any of said bids, or to re-advertise for bids under said ordinance, and in declaring the rights of plaintiff to be at an end, and each of said acts and proceedings of defendant and its officers, are a cloud upon the title of plaintiff and in violation and contravention of the rights, grants and contracts with defendant now owned by plaintiff and are in violation of Section 10 Article 1 of the Constitution of the United States, by impairing the obligation of contracts and grants with and to plaintiff and in violation of Section 1 of the 14th Amendment of the Constitution of the United States, by depriving plaintiff of property without due process of law, the benefit and protection of which it hereby invokes.

17 Plaintiff says it has no adequate relief in a court of law and is only relievable in a court of equity and will suffer great and irreparable damage and injury unless defendant is enjoined by preliminary injunction and final decree from accepting any bid under said ordinance and from further advertising for other bils thereunder.

Under the terms of said ordinance of July 14, 1913, defendant's said Council may and will consider said bids at its meetings on said 26th day of September, 1913, and may and will unless restrained by this court, accept a bid therefor before the matters herein can be heard on notice: that an acceptance of any bid would constitute a cloud on plaintiff's title to its irreparable damage: would result in a multiplicity of suits and contention and in an interruption of the public service in the carriage of pasengers as aforesaid.

Wherefore plaintiff prays that defendant, its agents, attorneys and officers, and each of them, be enjoined by restraining order, preliminary injunction and final decree, from carrying out the terms of said ordinance of July 14, 1913: from accepting any bid or making any grant thereunder: from advertising for any further bids thereunder: from interfering with or attempting to interfere with plaintiff in the maintenance and operation of its street railway lines upon defendant's streets, and from acting in any such form or manner as would alter, impair, limit or destroy the title of plaintiff in its grants as above described, and that plaintiff's title in and to said routes, and all of them, be settled and forever quieted by decree of this honorable court.

18 Plaintiff further prays that it may have a writ of subpœna to defendant, commanding defendant to appear before this court and answer this bill of complaint, but not under oath, its answer under oath being hereby waived, and also a writ of injunction,

enjoining and restraining the defendant, its officers, agents and attorneys as heretofore prayed, and that plaintiff may have such other and further relief as the nature of the case may require and as it would be entitled to in equity and in good conscience.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
By POLK LAFFOON, *Secretary.*

RICHARD P. ERNST,
ALFRED C. CASSATT,
FRANK W. COTTLE,
Solicitors for Plaintiff.

STATE OF OHIO,
County of Hamilton, ss:

Polk Laffoon, being duly sworn, says that he is the Secretary of the South Covington and Cincinnati Street Railway Company, the plaintiff in the foregoing bill, that he has knowledge of the facts alleged in the foregoing bill and that the allegations of said bill are true.

POLK LAFFOON.

Sworn to before me and subscribed in my presence this 25th day of September, 1913.

[SEAL.] ALLAN SMITH,
Notary Public in and for Said County and State.

19 *Restraining Order.*

Filed September 25, 1913.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, a Corporation Under the Laws of Kentucky, Plaintiff,
v.
THE CITY OF COVINGTON, a Municipal Corporation under the Laws of Kentucky.

Defendant, its officers and agents are hereby restrained and enjoined, until the further order of this Court, from accepting any bid or making any grant under the terms of the ordinance of the City of Covington approved July 14, 1913, and referred to in the bill herein, from taking any further action thereunder, and from doing any other acts or things to interfere with plaintiff's operation and maintenance of its street railway lines set forth in the bill herein.

Plaintiff is directed to serve notice on the defendant of the hearing

of the motion for an injunction; said hearing is set for the 4th day of October 1913, at two o'clock at Maysville, Kentucky.

A. M. J. COCHRAN,
District Judge.

September 25, 1913.

20 *Answer.*

Filed October 20, 1913.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, a Corporation Under the Laws of Kentucky, Plaintiff,

v.

THE CITY OF COVINGTON, a Municipal Corporation under the Laws of Kentucky, Defendant.

Answer.

Not waiving its motion hitherto filed to dismiss the Bill in Equity, or its motion to require the plaintiff to file the various ordinances, charters and contracts relied upon in the petition, the defendant, City of Covington, for answer to the Bill in Equity herein, admits that plaintiff was a corporation organized under a special charter of the Commonwealth of Kentucky, and that the defendant is a municipal corporation of the second class under the laws of Kentucky: denies that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand dollars or that it arises under the Constitution of the United States.

Defendant admits that plaintiff's charter is an Act of the General Assembly of the Commonwealth of Kentucky, approved June 25, 1876, entitled "An Act to Incorporate the South Covington and Cincinnati Street Railway Company;" admits that by the said Act of Incorporation the South Covington & Cincinnati Street Railway Company was created a body politic and corporate: but denies

21 that it has a perpetual succession and power to construct, own, hold, operate, and maintain a line or lines of street railway in the said City of Covington and in the vicinity thereof, along and over such streets and ways in said City as the City Council should grant the right of way to plaintiff. But says that said Act authorized the South Covington and Cincinnati Street Railway Company to sue and be sued, construct, operate and manage street railways in the City of Covington and vicinity and along such streets and public highways in the city as the council should grant the right of way to, and along such roads and streets out of the city as the companies or corporations owning the same may accede the right to the use of. Defendant admits that by the terms of the said charter the defendant City of Covington was authorized to grant a right of way to

and to agree to the necessary grade for the railway tracks: admits that said charter authorized the plaintiff company when the right of way could not be obtained by agreement, to proceed to condemn the same as in the case of turnpike, gravel and plank roads: denies that it was empowered to exercise the right of eminent domain and condemn the right of way on and over such streets and public ways within the limits of the said city, except as hereinabove set out.

Defendant further alleges that under said charter, authority was given to the company to cross the tracks of any other company and to connect with and use the tracks of any other railway company in the city of Covington and vicinity on equitable terms, that is
22 to pay such other company a fair compensation for the use of such tracks: that in the event a mutual agreement could not be affected with such other company for the use of such part of its track as desired, then and in that event such use might be condemned by proceedings under writ of ad quo damnum, as provided for in Chapter 110, entitled "Turnpike, Gravel and Plank Road" in the General Statutes.

Defendant alleges affirmatively that the General Council of the City of Covington by an ordinance dated December 15, 1864, duly passed and approved, being an ordinance entitled "An Ordinance providing for the terms and conditions of street passenger railroads in the City of Covington" provided that all other railway companies should be governed by the terms of the same and that the contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years. Defendant says that said ordinance was in full force and effect and had not been repealed at the time of any of the alleged grants mentioned in the Bill herein.

Defendant denies that by an ordinance dated December 13, 1869, or by any other ordinance, or by an agreement into on the 23rd day of December, 1869, or by any other agreement between this defendant and E. F. Abbott, S. J. Redgate, and J. C. Blick, their associates, successors, and assigns, or any other person or persons, it granted to the said E. F. Abbott, S. J. Redgate and J. C. Blick, the right in perpetuity to construct, hold, operate and maintain a street railroad upon and along Scott street from Fourth to Sixteenth Street: thence upon and along Sixteenth Street to Stevens Street: thence upon and along Stevens Street to Austin Street: or that it
23 granted any right in perpetuity to construct, operate and maintain a street railway commencing at the intersection of Scott and Fourth Street: thence along Fourth Street to Bakewell: thence south on Bakewell to Riddle Street: thence west on Riddle Street to Philadelphia, thence South on Philadelphia to Lexington Pike: or that it granted any right in perpetuity over any of the streets or ways of the City of Covington.

Defendant alleges that it granted to said parties all the right and authority that it had the capacity to grant, to construct, hold, operate a street railroad upon and along Scott Street, from Fourth to Sixteenth Street: thence upon and along Sixteen- Street to Madison Street also upon and along Sixteenth Street from Scott to Stevens Street: thence along and upon Stevens Street to Austin Street:

thence upon and along Austin Street to Williams Street: and that it thereby agreed to *five* to the said E. F. Abbot, S. J. Redgate and J. C. Blick all the right and authority that it had to grant, to construct, hold and operate a street railroad with suitable turnouts to be afterwards located by Council, upon and along the streets, provided the construction of the same be begun within thirty days and be completed within nine months from and after the date of the contract: alleges that said road was to be built upon the same terms and conditions expressed in this contract as to the other street railroads therein specified, except only as to the time within which said road, upon the streets therein after specified, should be begun and completed, to wit: commencing at the intersection of Scott and
24 Fourth Street: thence west and along Fourth Street to Bakewell Street: thence south on Bakewell Street to Riddle Street: thence west on Riddle Street to Pike Street thence south on Pike Street to the Lexington Pike: that when said ordinance was passed and said contract entered into, the ordinance of December 23, 1864 was in full force and effect and this contract with Abbott, et al., being a contract under that ordinance, was for the term of twenty-five years only.

Defendant City of Covington further alleges that under the first section of the rules governing the operation of the said proposed railroad, it was provided that no motive power except horses or mules, should be used on said railroad.

Defendant admits that by an ordinance of its duly *only* authorized City Council, passed on December 28, 1874, it modified the second route granted by the agreement of December 23, 1869, so that said route should extend over the following streets: to wit: Beginning at the corner of Fourth and Scott Streets, and running west on Fourth Street, to be modified as follows: To extend west on Fourth Street to Main Street, south on Main Street to Pike Street: East on Pike and across Madison to Cooper: thence on Scott and north on Scott to the beginning: but denies that it conferred on the said Abbott and his associates, *successots* and assigns the right and privilege to construct, hold and operate and maintain a street railway on and over the streets mentioned and set out in said agreement of December 23, 1869, except to this extent: that the ordinance provided "that the time for the commencement of the work of constructing the street railway lines set forth in the contract dated De-
25 cember 23, 1869, between said City of the first part and E. F. Abbott and S. J. Redgate of the second part, be and the same is hereby extended to said Abbott and such associates as may become interested with him, for the time of six months, from the passage hereof, upon the terms, conditions and stipulations contained in said contract, as if the same were herein repeated."

"The said Abbott and his associates incurring all the liabilities and responsibilities therein provided and to enjoy all the rights and privileges therein granted."

Said ordinance further provided that it would take effect upon its passage provided said Abbott should file within ten days in the City Clerk's office his written acceptance of the provisions of the said

ordinance, containing the obligations on his part of said contract, binding himself to complete the said road within nine months from the passage of said ordinance: that if not so completed said contract was to be void. Defendant, City of Covington, alleges that the said Abbott did not, within ten days or any time file in the City Clerk's office the acceptance therein provided for and required.

Defendant admits that through its Council by ordinance passed January 28, 1875, it attempted to authorize E. F. Abbott, his associates and assigns, upon the completion of the street railroad on the Fourth and Main Street route, granted by ordinance dated December 28, 1874, to construct a line of railway from Fourth to Market Street, and the alley immediately north thereof, to and across Second Street, with the necessary turnouts to make connection between the tracks crossin- the Suspension Bridge and that traversing Fourth Street, the track to occupy the center of said street and alley
26 and to be constructed after the same manner as the tracks in other streets which said Abbott, his associates and assigns were authorized to construct: and except to the extent hereinabove admitted, denies that it granted to said E. F. Abbott his associates and assigns, any right and authority to construct and operate a line of street railway.

Defendants admits that said E. F. Abbott and his associates, S. J. Redgate, Samuel V. Reid, and B. R. Morton, were afterwards, to wit: by an Act of the General Assembly approved January 21, 1870, created a body politic and corporate under the name and style of "The Covington and Cincinati Street Railway Company" with the right of perpetual succession and authorized, the said corporation, to contract and be contracted with, sue and be sued, construct and manage railways in said City of Covington and vicinity. Defendant alleges authority was given to the said company to connect with and use the tracks of any other railway company in the said city and vicinity. Defendant alleges authority was given to the said company to connect with and use the tracks of any other railway company in the said city and vicinity, on equitable terms, that is to pay such company a fair compensation for the use of such tracks.

Defendant admits that on the first day of May, 1875, E. F. Abbott and his associates did, after the incorporation of the Covington and Cincinnati Street Railway Company and before the ordinance of January 28, 1878, attempt to sell, convey, transfer and assign to the said Covington and Cincinnati Street Railway Company the contract of date December 23, 1869, and all and singular
27 the rights and privileges, franchises and interests which they or either of them had in and to said charter, contracts and ordinances, and all interest vested in them thereby, to the Covington and Cincinnati Street Railway Company: denies that said Abbott and his associates had any authority or right to so sell, transfer, assign or convey.

Defendant denies that in pursuance of the provisions of the said contract and ordinance, or otherwise, the Covington and Cincinnati Street Railway Company constructed a line of street railway on and over said routes, or that it continuously maintained, held and

operated the same until the 20th day of December, 1876; admits that on said date the Covington and Cincinnati Street Railway Company attempted to sell convey and transfer all of the estate, real, personal and mixed, located in Kenton County, Kentucky, including rights of way, grants, railway tracks, turnouts, turntables, land, lots, buildings, stables, offices, cars, horses, mules, harness, tools, and all and every article and species of property, rights and credits of or belonging to the Covington and Cincinnati Street Railway Company, including all benefit of the contract with the Cincinnati Consolidated Street Railroad Company, but denies that it had any right or authority to so do, denies that all of said attempted assignments were made with the knowledge of the defendant or that they were acquiesced in and ratified by the defendant.

Defendant admits that through its duly authorized City Council it did on October 13, 1881, pass the ordinance set out in the Bill as follows, to wit:

28 An Ordinance granting to the South Covington and Cincinnati Street Railway Company the right of way over Court Avenue, etc.

"Section 905. Whereas, the South Covington and Cincinnati Street Railway Company has laid and is now using a single track railway in the alley running from Third Street north to the Covington and Cincinnati Bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track, which it is believed will promote the convenience of the general public, Therefore

"Be It Ordained By The City Council of Covington:

That the South Covington and Cincinnati Street Railway Company be, and the same is hereby authorized to lay a double track on said proposed avenue from Second Street to Market space, so as to make connection with its track as now laid on Market space and Market street, and to use and enjoy the same, as well as its track on Fourth & Scott Streets; upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track by the provisions of a certain agreement entered into between E. F. Abbott, etc., and the City of Covington, on the 23rd day of December, 1869.

"Provided However, that the said South Covington and Cincinnati Street Railway Company shall file with the city clerk its written acceptance of this ordinance within ten days after its passage."

Defendant says that the South Covington and Cincinnati Street Railway Company did not file with the City Clerk its written acceptance of this ordinance within ten days after its passage, or at all; that by reason thereof said ordinance never became operative and said grants therein attempted to be made did not pass to the plaintiff herein.

Defendant denies that under and by virtue of the ordinances and grants alleged to have been made by this defendant and set

29 out in the Bill; or that under and by virtue of its said charter, plaintiff became duly invested in perpetuity with the right to construct, own, hold, operate and maintain a system of street

railway on and over said streets, in said contracts and ordinances set out; and denies that from and after the attempted assignments to it by the Covington and Cincinnati Street Railway Company of its grants, rights and privileges, it took possession of the said streets and all of them and has continuously operated, owned and maintained lines of street railway thereon; denies that plaintiff has at great expense, constructed and reconstructed, completed and repaired said lines of street railways on said streets and has exclusively operated said lines of street railways on and over said streets, from the date of said alleged assignments, towit: up to the filing of this bill: denies that it now owns and is operating the same.

Defendant says, however that it is true that under the attempted grant of October 7, 1892, hereinafter set out, it is operating a line of electrical railway over certain streets of the City of Covington; and that it is not operating said line of electrical railway under any other right or grant.

Defendant alleges that on the 23rd day of February, 1865, the General Council accepted a proposal of Thomas Sherlock, Malcolm McDowell, and their associates, to construct a line of street railway in the City of Covington: that thereafter on August 3, 1865, the General Council of the City of Covington passed an ordinance to amend and ordinance approved December 15, 1864, entitled "An Ordinance prescribing the terms and conditions of street
30 passenger railroads within the City of Covington" wherein the General Council provided for the amount of a license tax for each car and it further provided that after the expiration of the period of twenty five years that the City Council should again offer the same routes or other routes with other bounds, advertise any or all of them to the highest and best bidder, and provide for a method of the transfer of the property of the Covington Street Railway Company to such bidder, and that the Covington Street Railway Company should be entitled to continue to run the road upon the then existing conditions until a new bid had been accepted.

Defendant denies that it, through its duly authorized City Council, granted by contract or agreement of date August 15, 1865, to another corporation then existing, the Covington Street Railway Company the right to lay its tracks and operate a line of street railway on and over certain streets within the corporate limits of the City of Covington.

Defendant admits that the Street Railway Company claims and there is generally understood to be in existence a contract between the City of Covington and the Covington Street Railway Company the terms of which are hereinafter set out: but it denies the authority of the city to make such contract or the Covington Street Railway Company to accept such a grant and says that it had been unable to find any record of such grant in the records of the City of Covington. It says that the said grant recites that the city by resolution passed on the 23rd day of February, 1865, accepted the bids
31 and proposal of Thomas Sherlock and Malcolm McDowell and their associates, who were the owners of the stock and franchises of the Covington Street Railway Company, who had as-

signed and transferred their rights and interest under said accepted proposal to said company, and that thereafter the city, in consideration of this, granted to the Covington Street Railway Company permission to construct and operate railways upon the terms and conditions contained in an ordinance of the City Council passed on the 15th day of December, 1864, and the amendment thereto, dated August 3, 1865, and the provisions of the charter of said city and the charter of the said Railway Company and in pursuance thereof, on the streets mentioned in the Bill herein, upon such streets, alleys or public grounds as the city may have control of or condemn for public use as the City Council, with the consent of the said company, may designate; that it was understood that the city did not grant the absolute right of way on Madison Street from Twelfth to the Corporation Line, but only such right to use the same as far as it had control over it; that turnouts might be changed from *from* one street to another and to different points on the same streets, by and with the consent of both parties. Said alleged contract further provided that it should take effect and be in force from and after the 9th day of March; denies that said alleged contract or grant to the Covington Street Railway Company was for a period of twenty five years from and after the 15th day of August 1865, but admits that under the terms of the said alleged contract it was for a period of twenty five years from and after the ninth day of March, 1865.

32 Defendant admits that the General Council of the City of Covington did, on the 8th day of June, 1882, attempt to pass, and defendant herein denies its authority to pass an ordiance which attempted to authorize plaintiff to contract with the Covington Street Railway Company for the right of way over and along the streets specified in the alleged contract between the Covington Street Railway Company and the City of Covington, dated August 15, 1865; and that when the consent of the latter company had been obtained, the said South Covington and Cincinnati Street Railway Company was forever authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations and restrictions contained in the ordinances regulating its right to use the streets now occupied by the said South Covington and Cincinnati Street Railway Company. Defendant alleges that the ordinances so regulating its right to the streets, if any rights it had, were the ordinances of December 15, 1864, limiting the life of all franchises to the period of twenty- five years, and the other ordinances, contracts and resolutions herein set out. Defendant alleges that the said rights attempted to be conveyed were upon the condition that the South Covington and Cincinnati Street Railway Company should, within thirty days after the passage of the ordinance removing its track on Court Avenue and Park Place, and relinquish all right and claim to the same, and that further, in the event the city should authorize any other street railway company or companies to occupy and use said Court Avenue or Park

33 Place for street railway purposes, then the South Covington and Cincinnati Street Railway Company was to have the

same right to use said Court Avenue or Park Place that it then possessed under existing ordinances.

Defendant alleges that the South Covington and Cincinnati Street Railroad Company did not, within thirty days after the passage of this ordinance, remove its track on Court Avenue and Park Place, and that it did not and never has relinquished its alleged rights and claims to the same; that the city of Covington has not authorized any other street railway company or companies to use said Court Avenue or Park Place for street railway purposes, and that the South Covington and Cincinnati Street Railway Company is now occupying and using the said Court Avenue and Park Place for street railway purposes.

Defendant alleges that said ordinance further provided that it should take effect only upon the written acceptance of the South Covington and Cincinnati Street Railway Company, filed in the office of the City Clerk ten days from the date of said ordinance. Defendant denies that the plaintiff has ever filed its written acceptance of said ordinance; denies that the City of Covington had any authority or right to authorize the South Covington and Cincinnati Street Railway Company so to contract with the Covington Street Railway Company or that either company had the right to so contract with the other.

34 Defendant denies that on or about the — day of ——, 1882, plaintiff contracted with the Covington Street Railway Company for the right of way over and along the streets specified in the alleged contract between said company and the City of Covington, of date August 15, 1865: denies that it purchased the same in pursuance of the terms of the ordinance of June 8, 1882: denies that as a consideration or otherwise, for the alleged perpetual rights and privileges alleged to be granted in said ordinance of June 8, 1882, it removed its track from Park Place and Court Avenue, and denies that it ever relinquished its right to occupy a street railway track on and over said Park Place and Court Avenue: denies further that it attained any perpetual rights and privileges by the alleged ordinance of June 8, 1882, or otherwise.

Defendant alleges, however, that on the 30th day of March, 1883, the Master Commissioner of the Kenton Chancery Court in the Commonwealth of Kentucky, attempted to alien and convey to the South Covington and Cincinnati Street Railway Company, all the rights, title and interest of Amos Shinkle, Trustee of the Covington Street Railway Company, a corporation under the laws

35 of Kentucky, Charles W. West, the Covington Street Railway Company, and others, in and to the right of way of the Covington Street Railway Company, to cross the Covington and Cincinnati Bridge and on the Bridge approach, and also the right of way for a period of twenty five years, from August 15, 1865, over the streets traversed them by the Covington Street Railway Company, and other streets specified in the contract between said Company, the City of Covington dated August 15, 1865: also certain tracks then laid in the city of Covington and also a double track on the approach to the Covington and Cincinnati Bridge; also

about four hundred feet of track on the approach of said Bridge on the Cincinnati side: also part of a track on Third Street between Madison and Main Streets: also other personal property and real estate: also the rights, privileges and franchises of the Covington Street Railway Company, under charter, authorized the construction and operation of a street railway, of the General Assembly of the Commonwealth of Kentucky approved February 9, 1864, and the amendment thereto approved March 20, 1872, excepting only the franchise to be a corporation. Defendant alleges that the said attempt is null and void and of no effect.

36 Defendant denies that by the alleged removal of plaintiff's track from Park Place and Court Avenue as hereinset out, for ever relinquishing as plaintiff alleges, its right to maintain its tracks on Park Place and Court Avenue, it surrendered its only means and way of approach for its cars to the Suspension Bridge over the Ohio River between Covington, Kentucky and Cincinnati, Ohio, excepting by and over the lines claimed to have been secured by it with the consent of the defendant from the Covington Street Railway Company; denies that the Covington Street Railway Company ever owned or possessed any rights of way for the approach of its cars to the Suspension Bridge.

Defendant denies that by virtue of its alleged purchase from the Covington Street Railway Company made, as alleged, with the consent of this defendant, or that by virtue of the alleged ordinance of June 8, 1882, or for any alleged consideration, the South Covington and Cincinnati Street Railway Company became possessed in perpetuity of the right to construct, operate and maintain a line of street railway on and over the streets and each of them specified in the alleged contract between the Covington Street Railway Company and the City of Covington, of date August 15, 1865, designated therein as routes numbered 1 to 5, inclusive.

Defendant alleges that the South Covington and Cincinnati Street Railway Company is now operating a line of electric railroad over many of the streets and ways of the City of Covington without authority, without right, and without permission from the

37 City of Covington or elsewhere.

Defendant denies that since the taking possession, as claimed, of the rights of the said streets acquired from the Covington Street Railway Company, or that relying upon said purchase or the ordinance authorizing said purchase, the said South Covington and Cincinnati Street Railway Company has at great expense or otherwise, reconstructed the said tracks on said streets, or that it has equipped said tracks and lines at great expense or otherwise, reconstructed the said tracks on said streets, or that it has equipped said tracks and lines at great expense, or that it has continuously operated street cars on and over the same since the date of the said alleged purchase from the Covington Street Railway Company, and the acquiring of the alleged perpetual rights from the City of Covington, or that it is now operating the same under any of the alleged ordinances or rights claimed by the plaintiff.

Defendant admits that it did, on the 15th day of September,

1890, by resolution declare that the right of plaintiff to operate and maintain a street railway on and over the streets specified in the routes numbered 1 to 5, aforesaid, claimed to have been acquired from the Covington Street Railway Company, had expired and terminated, but denies that it did so wrongfully. Defendant admits that the matter of advertising the franchise of the said Covington Street Railway Company was referred to a special committee of three, in conjunction with the Committee on Law and City Solicitor for report; that thereafter, to-wit: on September 18, 1890, the Committee did report that said franchise had ex-
38 pired. But denies that there was any report, ordinance or resolution to the effect that the property of the said Street Railway Company be taken from the plaintiff.

Defendant admits that thereafter plaintiff brought this suit in equity in the United States District Court for the Eastern District of Kentucky to enjoin the said action so proposed by defendant, and that a temporary injunction was granted by said court pending the hearing of said cause.

Defendant admits that before said cause was finally heard the plaintiff and defendant attempted to enter into an agreement, embodied in the alleged ordinance of the Common Council of the City of Covington, approved October 7, 1892, accepted by the plaintiff, whereby it was attempted to be agreed, in consideration of certain things to be done by plaintiff, to postpone the enforcement of any of its claimed rights and franchises for the operation of a street railway in the City of Covington, for the period of twenty years from and after the acceptance of said ordinance; that the said understanding and agreement, embraced that nothing in said ordinance should be held or construed to be a surrender of, or to prejudice any of the rights or claims of either said city or said company. That it was further agreed that both parties would endeavor to secure a determination of their rights and that the plaintiff immediately thereafter procured the dismissal of said action. Defendant further states that plaintiff surrendered all of its alleged franchises and grants by accepting the terms of the said ordinance.

Defendant alleges, however, that the said ordinance at-
39 tempted to grant to the South Covington & Cincinnati Street Railway Company the right to operate an electric railway within the City of Covington, and to fix the term and provide the conditions thereof. Defendant alleges that the said ordinance was void and of no effect for the reason that the constitution of the Commonwealth of Kentucky, in force at that time, provided that no city, town, taxing district or any other municipality should be authorized or permitted to grant any franchise or privilege, or to make any contract in reference thereto, for a term exceeding twenty years, and that before granting such franchise for a period or term of years, such municipality should first, after due advertisement, receive bids therefor publicly and award the same to the highest and best bidder. Defendant says that the said franchise was attempted to be let without any advertisement for bids.

Defendant, City of Covington, denies that plaintiff complied with

all and singular the conditions and obligations of the said alleged ordinance. Denies that it has spent large sums of money, to-wit: more than a million dollars.

Defendant admits that on or about July 11, 1901, by ordinance of the General Council approved on said date, it requested plaintiff to change its tracks and a portion of its street railway lines from the corner of Second and Scott Street- to Greenup Street; and from Greenup between Second and Park Place to Court Street and Park Place. Defendant says that said ordinance further provided that in the event the City of Covington should hereafter attempt to authorize any other person or corporation to occupy and use said streets,
40 or any part thereof, for street railway purposes, or for the construction, operation and maintenance of any such system, then the South Covington and Cincinnati Street Railway Company should have and regain the same rights to use said streets that it then possessed under existing laws and ordinance; and that in the event the attempted rights therein granted to the South Covington and Cincinnati Street Railway Company, or the first section of said ordinance should be taken from the said company or that said company should be prevented from exercising said rights, or should said company fail to retain said rights, then it should retain an- possess in every respect the rights which it then had over and upon the streets mentioned in section 2 thereof, and that the land conveyed by it to said city should revert to it, the South Covington and Cincinnati Street Railway Company. Defendant says that all of the said attempted grants, agreements and alleged rights were void and of no effect for the reason that they are a violation of the statutes of the Commonwealth of Kentucky, hereinbefore set out.

Defendant denies that the said ordinance was duly accepted by plaintiff, or that said railway tracks were constructed on said Court Avenue and Park Place in accordance with the terms of said alleged ordinance, or that a street railway line has been operated thereon ever since said time under the terms of said ordinance.

Defendant denies that plaintiff is now engaged in the through operation of cars from points in Cincinnati, Ohio, to points in Covington, Kentucky, and Newport, Kentucky, whereby passengers are transported in inter-city and inter-state commerce between
41 said points, for one fare without change of cars.

Defendant admits that it passed an ordinance approved July 14, 1913, providing for the letting at public bidding of the franchise of entering in and upon certain streets and ways of the City of Covington, Kentucky, for the purpose of constructing, operating and maintaining a street railway line for the term of twenty years, and that by the terms of said ordinance bids were to be received by the City Clerk of the City of Covington on the day of the first meeting of the General Council ten weeks after the first publication of said ordinance and admits that the City Clerk advertised that he would receive bids under said ordinance, between the hours of 9 o'clock A. M. and 5.30 o'clock P. M., on the 26th day of September, 1913.

Defendant admits that under the terms of said ordinance any bids

so received on said day, would have been submitted to the General Council for its acc*pe*tance or rejection; admits that if no bids were received on said date, or if bids were received and rejected, defendant, through its officers, would have the right to readvertise the sale of said franchise under the terms of said ordinance.

Defendant admits that it claims, and alleges affirmatively that the alleged grants and rights of the plaintiff herein before descril ed, have expired; denies that it has le*agl* right to further occupy the streets of the City of Covington with its rails and equipment, and to operate its street railway lines thereon; denies that in advertising said franchise for sale under said ordinance of July 14, 1913, and in
42 seeking to receive bids thereunder, that it either intended or proposed to grant to another the right to maintain and operate street railway lines over the streets now occupied as aforesaid, by this plaintiff, and to exclude plaintiff from further operation of its lines thereon, but says that it intended and proposed under the terms of said ordinance, to grant the said right to the highest and best bidder. Defendant denies that any irreparable damage to plaintiff and in contravention of its contract rights as aforesaid, will result.

Defendant denies that the operation of street railway lines by a grantee under said ordinance, over and upon the streets therein set forth, would prevent the operation by plaintiff of its lines thereon, and denies that it would be either an impairment or a destruction of plaintiff's alleged rights on said streets; denies that it is impossible that tracks, poles, wires, and equipment for the operation of a street railway other than those of plaintiff, can be placed and used, or that electric cars other than plaintiff's could be operated on said streets without their practical destruction as thoroughfares for public travel.

Defendant denies that through its officer or otherwise it has made and is now making repeated attacks upon the property rights of plaintiff, and upon its rights to own and operate lines of street railway on and over said routes in Covington. Defendant admits that it has publicly and openly declared that plaintiff has no legal right to *to* operate its lines of street railway on and over said routes or
43 any of them, and now so declares and alleges; denies that it has openly and publicly declared, or that it is declaring its intention to oust plaintiff from said rights s herein set out; denies that the sole purpose of the passage of the ordinance of July 14, 1913, and the receipt of bids thereunder, was to grant to another the right to operate street railway lines on said streets now enjoyed by plaintiff, and to forever and entirely exclude plaintiff from the enjoyment of the same or any of them; but alleges that the purpose of the passage of the said ordinance of July 14, 1913, was to grant to the highest and best bidder the right and privilege to operate a street railway line on the streets therein mentioned, for a period of twenty years.

Defendant denies that plaintiff has never in any way consented to the passage of said ordinance, or that its consent was necessary; denies that defendant has been engaged in a wrongful and unlawful action, or that the plaintiff has ever protested against the same; denies that plaintiff has at all times claimed, to the knowledge of

this defendant, the right in perpetuity to operate its street railway lines over and upon said streets, and denies that any grant to another, such as that under the ordinance of July 14, 1913, would be an impairment or a destruction of any of the plaintiff's alleged rights.

Defendant denies that the acceptance of any bids under said ordinance or any further advertisement for bids thereunder would be a cloud upon plaintiff's title to its grants as aforesaid; denies that it would irreparably damage it in its said inter-state and inter-
44 city business; denies that it would result in vexatious litigation, multiplicity of suits, and interruption and impairment of the public service in the carriage of passengers by the plaintiff company; denies that it would result in the irreparable damage of plaintiff, and to the inconvenience and damage of the public.

Defendant denies that the proceedings, acts and conduct of the defendant by its counsil and officers, in passing said ordinance of July 14, 1913, and receiving bids thereunder, and proposing to accept any of said bids, or to readvertise for bids under said ordinance, and in declaring the rights of plaintiff to *he* at an end, and each of said acts, proceedings of defendant and its officer, are a cloud upon the title of plaintiff, and are in violation and contravention of any right, grant and contract of the defendant, now owned or claimed, and denies that they are in violation of Section 10, Article 1 of the Constitution of the United States, by impairing the obligation of contracts and grants with and to plaintiff, and are in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, by depriving plaintiff of property without due process of law.

Defendant denies that plaintiff has no adequate relief in a court of law; denies that it is only relievable in court of equity; denies that it will suffer great and irreparable damage and injury unless *plaintiff* is enjoined from accepting any bid under said ordinance, and from further advertising for other bids thereunder; denies that the acceptance of any bid would constitute a cloud upon
45 plaintiff's title to its irreparable damage; denies that it would result in a multiplicity of suits and contention and in an interruption of the public service in the carriage of passengers as aforesaid.

Defendant says that Section #573, Kentucky Statutes, is as follows:

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporation, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corporation shall after said date, exercise any powers, privileges or immunities repealed by this section or inco-sistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor,

and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

Defendant alleges that the charters of the Covington Street Railway Company and the Covington and Cincinnati Street Railway Company, and the South Covington and Cincinnati Street Railway Company, are inconsistent with Section #573, Kentucky Statutes, and were therefore repealed by said section on September 28, 1897.

46 Wherefore, defendant, Citye of Covington, having fully answered, prays that the restraining order herein granted be discharged; that the Bill herein be dismissed; for its costs herein expended and all proper relief.

STEPHENS L. BLAKELY,
Solicitor for Defendant,
City of Covington.

47 *Affidavit of George M. Abbott.*

Filed Oct. 28, 1913.

STATE OF OHIO,
County of Hamilton, ss:

George M. Abbott being duly sworn says:

He is the son of the E. F. Abbott to whom and his associates the grant was made by the City of Covington by ordinance dated December 13, 1869 and referred to in the bill herein: that in or about the month of June, 1875, he entered into the employ of the Covington & Cincinnati Street Railway Company, referred to in the bill herein, in connection with the construction and operation of a street railway line upon the streets of the City of Covington: that he remained in the employ of said company in the City of Covington from said date until said company assigned its property and franchises to the South Covington & Cincinnati Street Railway Company, on or about the 20th day of December, 1876, when he became an employe of said South Covington & Cincinnati Street Railway Company: that he remained actively in the employment of the said company in the City of Covington in connection with the construction and operation of its street railway lines therein from said date until the year 1908: that he then became Treasurer of said Company in or about the year 1885 and Secretary of said company in or about the year 1890 and continued in both offices until 1908.

When affiant entered into the employ of the Covington & Cincinnati Street Railway Company the Covington Street Railway Company referred to in the bill herein, was engaged in the operation

of a street railway line in the City of Covington on the follow-
48 ing streets: viz: Madison Avenue from Twelfth to Third, thence on Third to Greenup, thence on Greenup to Second, thence west on Second to the Suspension Bridge, returning from the Suspension Bridge Entrance to Second Street west on Second Street to Scott, south on Scott to Third, west on Third to Madison and south on Madison to the place of beginning.

That when he entered into the employ of the Covington & Cincinnati Street Railway Company as aforesaid in the year 1875 said company was engaged in the construction of a street railway line over and upon the following streets in the City of Covington, viz: beginning at Fourth and Scott Streets west on Fourth to Main, south on main to Pike, east on Pike and crossing Madison to Cooper thence to Scott, north on Scott to the place of beginning.

Also a line of street railway from Fourth north through Market Street and the alley immediately north thereof to and across Second Street, making connections with the track crossing the Suspension Bridge and that traversing Fourth St.

Affiant says that said lines were completed and the operation of street cars commenced thereon by the Covington & Cincinnati Street Railway Company prior to the 20th day of December, 1876, when the Covington & Cincinnati Street Railway Co., conveyed its property and franchise to the South Covington & Cincinnati Street Railway Company.

That the provisions of the ordinance of December 28, 1874, referred to in the bill herein, were accepted in fact by said E. F. Abbott by the construction upon the streets named therein and the streets named in the subsequent ordinance of the City of Covington of January 28, 1875, referred to in the bill herein, of a street
49 railway line by the Covington & Cincinnati Street Railway Co., incorporated for said purpose by said Edward F. Abbott and his associates.

Affiant says that the ordinance of October 13, 1881, referred to in the bill and set forth in the answer herein, was duly accepted in writing by the South Covington & Cincinnati Street Railway Company and that said written acceptance was filed in the office of the City Clerk on the 14th day of October, 1881.

That the ordinance of June 8, 1882, referred to in the bill herein, was accepted in writing by the South Covington & Cincinnati Street Railway Company: that said acceptance was also signed by the Covington Street Railway Company and was filed with the City Clerk of Covington on June 9, 1882: that the Covington Street Railway Company gave the consent called for by said ordinance of June 8, 1882, by a contract in writing between said South Covington & Cincinnati Street Railway Co., and the Covington Street Railway Co.

That subsequent to the passage of said ordinance the said South Covington & Cincinnati Street Railway Co., removed its tracks on Court Avenue and Park Place and commenced the use, in lieu thereof, of Greenup from Fourth to Second, Second Street from Greenup to Scott and Scott Street from Second to Fourth: that affiant believes

from records in his possession and therefore avers that said change was made in the month of June, 1882.

Affiant says that in making said change it gave up its only access to the Suspension Bridge and to the City of Cincinnati and accepted in lieu thereof the access to the Suspension Bridge and to the City of Cincinnati by way of Greenup, Second and Scott Streets as aforesaid.

50 Affiant says that from the time of said change of tracks as aforesaid, the said South Covington & Cincinnati Street Railway Co. ceased to use for street railway or other purpose said Court Avenue and Park Place until the year 1901, when it again occupied said streets, after and pursuant to the ordinance of the City of Covington passed in the year 1901 and referred to in the bill herein.

Affiant says that in the year 1882 when said ordinance of June 8, 1882 was passed, the street railway lines in operation in the City of Covington are correctly represented by the plat marked "Exhibit A" and filed herewith, the lines operated by the Covington Street Railway Co. being in blue and the lines occupied by the South Covington & Cincinnati Street Railway Co. being in green.

Affiant says that shortly after the passage and acceptance of said ordinance of June 8, 1882, the South Covington & Cincinnati Street Railway Co. commenced the operation of its cars over the streets upon which tracks had been constructed by the Covington Street Railway Company as appears on said plat, and that thereafter it built its tracks and operated its cars over the greater portion of the streets covered by said routes Nos. one to Five, set forth in the bill: that it continued the operation of its lines over such streets and all the other streets hereinabove referred to until the year 1892 when the ordinance of October 7, 1982, referred to in the bill herein, was passed. After the passage and acceptance of said ordinance of October 7, 1892 the said South Covington & Cincinnati Street Railway Company made the changes in its routes required by said ordinance of 1892 and continued the operation of its cars over said routes so changed or substantially so, down to 1908, save and

51 except the change in the route made by the ordinance of 1901 above referred to.

Affiant says that while he has not been an official of said South Covington & Cincinnati Street Company since 1908, he has been familiar with its affairs: he has been a daily passenger on its cars, and he believes and therefore avers that said continuous operation has continued from the year 1908 down to the time of the filing of the bill herein.

That in the year 1901 plaintiff, at the request of the City of Covington changed its tracks and the operation of its cars from the portion of Second Street between Scott and Greenup from Greenup between Second and Park Place, from Scott between Second and Park Place to Court Street and Park Place and has since said time operated its said cars over Court Street and Park Place instead of said Greenup, Second and Scott Stree's.

Affiant says that on or about the 5th day of August, 1889, the Council of the City of Covington adopted an ordinance authorizing

the South Covington & Cincinnati Street Railway Company to operate a system of electric street railway over all the streets of the city on which it was then operating its street railway lines or on and over all the other streets in the city on and over which it had the right or power to operate a street railway, and that said ordinance was accepted in writing by said company: that pursuant thereto said company established and operated a system of electric street railway over its lines and had the same in operation at the time of the passage of the ordinance of October 7, 1892.

GEORGE M. ABBOTT.

Sworn to before me and subscribed in my presence this
52 27th day of October, 1913.

GEORGE STUGARD,
Notary Public in and for Said County and State.

Affidavit of Polk Laffoon, Secretary.

Filed October 28, 1913.

The affiant, Polk Laffoon, states that he is Secretary and Treasurer of the South Covington & Cincinnati Street Railway Company, and that on the third day of September, 1913 he did deliver the following communication to George E. Phillips, Mayor of the City of Covington.

September 3rd, 1913.

"The Mayor and General Council of the City of Covington, Covington, Kentucky.

GENTLEMEN: You are hereby notified that the ordinance you have recently adopted entitled "Providing for the letting at public bidding of the franchise of entering in and upon certain streets and ways of the City of Covington, Kentucky, for the purpose of constructing, operating and maintaining a street railway line, for the term of twenty years, prescribing the terms thereof and granting of said franchise to the highest bidder therefor, subject to the right of the General Council to reject any and all bids," is in contravention to the rights and franchises for the operation of street railway lines on said streets of Covington, owned and controlled by this company under its charter and its contract with the City, and that the proposed sale of said franchise under said ordinance will be an impairment of this Company's contract with the City of Covington and an irreparable damage to its property rights.

Very respectfully,

SOUTH COVINGTON & CINCINNATI
ST. RY. COMPANY,
By POLK LAFFOON, *Secretary.*"

53 The affiant further states that the said George E. Phillips, Mayor, did transmit the above communication to the General Council of the City of Covington and same was referred by that body to the City Solicitor and the Committee on Law and that the said City Solicitor and Committee on Law did make the following report to the General Council on Monday, September 15, 1913, which was concurred in by that body.

"We, your Committee on Law, in conjunction with the City Solicitor, to whom was referred the communication of the South Covington & Cincinnati Street Railway Company, in connection with the sale of the street railway franchise in the City of Covington, beg leave to report that in the opinion of this Committee the City Council was perfectly well aware of its rights in this matter, without advice or opinion from the street car company: that what the South Covington and Cincinnati Street Railway Company may or may not think, will not be a rule to govern the acts of the City Council of Covington and that it is not necessary to refer the letter of the Street car company for invesigation or for the purpose of seeing if the City had a right to pass the franchise ordinance, for the reason that in the opinion of this committee these questions are not now debatable. This Committee assumes that when the General Council passed the franchise ordinance, it was then of the opinion that it had the right to pass it. This committee is of the opinion that the General Council will not at this late date submit to investigation, whether that opinion was right or wrong, and that it will proceed to the sale of the franchise as provided for in the ordinance. This committee is familiar with the claims of the street car company and its opinions that its franchises have not expired. When the franchise ordinance became a law the General Council at that time disposed of these claims and unalterably fixed its position. This Committee is of the opinion that bids will be received under the new franchise ordinance and if the street car company believes it to be invalid, this committee begs leave to report that the street car company will have to find relief, if any, in the courts and not before this body. This committee if of the opinion that all of the franchise rights held, owned, operated or controlled by the South Covington & Cincinnati Street Railway Company have expired: that the company is now operating on the streets of the City of Covington without license and without right. This committee recommends that the City Council take no steps of any kind looking toward a further investigation of the alleged rights of the street car company or any of its alleged franchises in the City of Covington: that the General Council proceed as provided under the franchise ordinance: receive bids and sell the franchise
54 to operate an electric line of railway in the City of Covington to the highest and best bidder under the terms of the franchise ordinance. The committee recommends that the street car company should look to its duties as well as to its alleged rights."

Further deponent saith not.

POLK LAFFOON.

Subscribed and sworn to before me by Polk Laffon, this the 24th day of September, 1913.

A. A. HERMES,
[SEAL.] *Notary Public, Kenton Co., Kentucky.*

My commission expires Jan. 22, 1916.

Amended Affidavit of George M. Abbott.

Filed February 20, 1914.

STATE OF OHIO,
County of Hamilton, ss:

George M. Abbott being duly sworn says:

He is the son of the E. F. Abbott to whom and his associates the grant was made by the City of Covington by ordinance dated December 13, 1869 and referred to in the bill herein: that in or about the month of June, 1875, he entered into the employ of the Covington & Cincinnati Street Railway Company, referred to in the bill herein, in connection with the construction and operation of a street railway line upon the streets of the City of Covington; that he remained in the employ of said company in the City of Covington from said date until said company assigned its property and franchises to the South Covington & Cincinnati Street Railway
55 Company: that he remained actively in the employment of said company in the City of Covington in connection with the construction and operation of its street railway lines therein from said date until the year 1908: that he became Treasurer of said Company in or about the year 1885, and Secretary of said company in or about the year 1890, and continued in both of said offices until 1908.

When affiant entered into the employ of the Covington & Cincinnati Street Railway Co., the Covington Street Railway Company, referred to in the bill herein, was engaged in the operation of a street railway line in the City of Covington on the following streets, viz: Madison Avenue from Twelfth to Third, thence on Third to Greenup, thence on Greenup to Second, thence west on Second to the Suspension Bridge, returning from the Suspension Bridge entrance on Second street west on Second Street to Scott, south on Scott to Third, west on Third to Madison and south on Madison to the place of beginning.

That when he entered into the employ of the Covington & Cincinnati Street Railway Company as aforesaid in the year 1875, said company was engaged in the construction of a street railway line over and upon the following streets in the City of Covington, viz: beginning at Fourth and Scott Streets, west on Fourth to Main, south on Main to Pike, east on Pike and crossing Madison to Cooper thence to Scott, north on Scott to place of beginning.

Also a line of street railway from Fourth north through Market

Street and the alley immediately north thereof to and across
56 Second Street, making connections with the track crossing the Suspension Bridge and that traversing Fourth St.

Affiant says that said lines were completed and the operation of street cars commenced thereon by the Covington & Cincinnati Street Railway Co. prior to the 20th day of December, 1876, when the Covington & Cincinnati Street Railway Co. conveyed its property and franchise to the South Covington & Cincinnati Street Railway Company.

That the provisions of the ordinance of December 28, 1874, referred to in the bill herein, were accepted in fact by E. F. Abbott by the construction upon the streets named therein and the streets named in the subsequent ordinance of the City of Covington of January 28, 1875, referred to in the bill herein, of a street railway line by the Covington & Cincinnati Street Railway Co., incorporated for said purpose by said Edward F. Abbott and his associates. Said company expended in the construction and equipment of said street railway line more than $48,000.00. Said company also commenced and has continued until the present time the operation of its cars over the Suspension Bridge crossing the Ohio River into the central portion of the City of Cincinnati and return.

Affiant says that the ordinance of October 13, 1881, referred to in the bill and set forth in the answer herein, was duly accepted in writing by the South Covington & Cincinnati Street Railway Co., and that said written acceptance was filed in the office of the City Clerk on the 14th day of October, 1881.

57 That the ordinance of June 8, 1882, referred to in the bill herein, was accepted in writing b ythe South Covington & Cincinnati Street Railway Company, that said acceptance was also signed by the Covington Street Railway Company and was filed with the City Clerk of Covington on June 9, 1882: that the Covington Street Railway Company gave the consent called for by said ordinance of June 8, 1882, by a contract in writing between said South Covington & Cincinnati Street Railway Company and the Covington Street Railway Company.

That subsequent to the passage of said ordinance the said South Covington & Cincinnati Street Railway Company removed its tracks on Court Avenue and Park Place and commenced the use, in lieu thereof, of Greenup from Fourth to Second, Second Street from Greenup to Scott and Scott Street from Second to Fourth: that affiant believes from records in his possession, and therefore avers that said change was made in the month of June, 1882.

Affiant says that in making said change it gave up its only access to the Suspension Bridge (which was and is the only bridge between Covington and Cincinnati having facilities for the operation of street cars) and to the City of Cincinnati and accepted in lieu thereof the access to the Suspension Bridge and to the City of Cincinnati by way of Greenup, Second and Scott Streets as aforesaid.

Affiant says that from the time of said change of tracks as aforesaid, the said South Covington and Cincinnati Street Railway Co.

ceased to use for street railway or any other purpose said Court Avenue and Park Place until the year 1901 when it again
58 occupied said streets after and pursuant to the ordinance of the City of Covington passed in the year 1901 and referred to in the bill herein.

Affiant says that in the year 1882, when said ordinance of June 8, 1882 was passed, the street railway lines in operation in the City of Covington are correctly represented by the plat marked "Exhibit A" and filed herewith, the lines operated by the Covington Street Railway Company being in blue and the lines occupied by the South Covington & Cincinnati Street Railway Company being in green.

Affiant says that shortly after the passage and acceptance of said ordinance of June 8, 1882, the South Covington & Cincinnati Street Railway Company commenced the operation of its cars over the streets upon which tracks had been constructed by the Covington Street Railway Company as appears on said plat, and that thereafter it built its tracks and operated its cars over the greater portion of the streets covered by said routes Nos. One to Five, set forth in the bill: that it expended on account of construction and commencing the operation over said routes so acquired a sum in excess of $150,000.00 and that between the years 1875 and 1892 it expended in construction and equipment on its lines in said City of Covington on the faith of said grants or extensions thereof, a sum in excess of $300,000.00 now represented by outstanding bonds and stock of said company: that it continued the operation of its lines over such streets and all the other streets hereinabove referred to until the year 1892 when the ordinance of October 7, 1892 referrd to in the bill herein, was passed. After the passage and acceptance of said ordinance of October 7, 1892, the said South Covington &
59 Cincinnati Street Railway Company made the changes in its routes required by said ordinance of 1892 and continued the operation of its cars over said routes so changed, or substantially so down to 1908, save and except the change in the routes made by the ordinance of 1901 above referred to.

Affiant says that while he has not been an official of said South Covington & Cincinnati Street Railway Co. since 1908, he has been familiar with its affairs: he has been a daily passenger on its cars, and he believes and therefore avers that said continuous operation has continued from the year 1908 down to the time of the filing of the bill herein.

That in the year 1901 plaintiff, at the request of the City of Covington, changed its tracks and the operation of its cars from the portion of Second Street between Scott and Greenup, from Greenup between Second and Park Place from Scott between Second and Park Place to Court Street and Park Place and has since said time operated its said cars over Court Street and Park Place instead of said Greenup Street, Second Street and Scott Street.

Affiant says that on or about the 5th day of August, 1889 the Council of the City of Covington adopted an ordinance authorizing the South Covington & Cincinnati Street Railway Company to operate a system of electric street railway over all the streets in the city on

which it was then operating its street railway lines or on and over all the other streets in the city on and over which it had the right or power to operate a street railway, and that said ordinance was accepted in writing by said company: that pursuant thereto said com-
60 pany established and operated a system of electric street railway over its lines and had the same in operation prior to the time of the passage of the ordinance of October 7, 1892.

GEORGE M. ABBOTT.

Sworn to before me and subscribed in my presence this 22nd day of November, 1913.

GEORGE STUGARD,
Notary Public, in and for said County and State.

61 *Stipulation as to Proof.*

Filed Nov. 17, 1915.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY
v.
THE CITY OF COVINGTON.

It is stipulated between the parties that this case shall be submitted for final decree upon the following evidence.

1. Amended affidavit of George M. Abbott with plat marked "Exhibit A."

2. Affidavit of Polk Laffoon.

It is agreed that the said affidavits shall be treated in all respects as the testimony of said witnesses.

3. Compilation of Charters, Ordinances, Contracts, etc., relating to Street Railways in the City of Covington, marked "Exhibit B."

It is agreed that said "Exhibit B" contains true and correct copies of the Charters, Ordinances, deeds, contracts, corporate records and other instruments purporting to be copied therein and that same shall be taken in evidence with the same force and effect as if the originals were duly and formally proved and placed in evidence herein.

4. Compilation of Charters, Ordinances, Contracts, etc., relating to Street Railways in the City of Covington, marked "Exhibit C."

62 It it agreed that said Exhibit C contains true and correct copies of the charters, ordinances, deeds, contracts corporate records and other instruments purporting to be copied therein, and that same shall be taken in evidence with the same force and effect as if the originals were fully and formally proved and placed in evidence herein.

5. A printed copy of Council Ordinance of the City — Covington, No. 9069, approved by the Mayor July 14, 1913, and referred to in the bill and her- marked "Exhibit D."

MAPS

TOO

LARGE

FOR

FILMING

The foregoing were before the court on the motion for temporary injunction herein.

6. Deposition of Wm. H. Harton with exhibits attached thereto.

7. Copy of the record in the case of Woodall v. The South Covington & Cincinnati St. Ry. Co., in the Circuit Court of Kenton County, which said copy shall be treated in all respects as if duly certified according to law. It being stipulated in connection therewith that the judgment of the Circuit Court of Kenton County was duly affirmed by the Court of Appeals of Kentucky. Said copy of record is marked "Exhibit E."

ERNST, CASSATT & COTTLE,
For Plaintiff.

F. W. SCHMITZ,
City Solicitor for Covington.

63 *Order.*

Entered & Filed Apr. 5, 1915.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

The parties hereto having agreed, that the proof, including affidavits and exhibits, introduced by both sides upon the motion for temporary injunction herein, should constitute the proof upon submission of this cause for final judgment, and that either party may, by depositions, within thirty days from date hereof, introduce such further proof as they may deem advisable, it is now ordered, that this cause shall stand submitted for final judgment, as of May 5, 1915, upon the proof introduced on the motion for temporary injunction, and with leave to introduce further proof, by depositions, to be taken and filed prior to said date of submission.

(Here follows map marked page 64.)

65 United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

Council Proceedings, April 15, 1869, Application of Abbott.

Book H, Page 176.

April 15, 1869.

"Mr. Noonan presented a petition from E. F. Abbott, Samuel J. Redgate and James C. Blick asking Council to them, their successors and assigns the privilege of building and operating a street railway with singlr or double track on, over and along the following streets, to-wit:

Commencing at the following streets,

Commencing at Fourth and Scott Streets and running in a southerly direction on Scott Street to Sixteenth Street, thence westerly on Sixteenth Street to Madison Street or Banklick turnpike, thence southwardly on Madison or Banklick turnpike to the City limits with the City's right of way over the said Madison Street or Banklick turnpike.

Also commencing at Sixteenth and Scott Streets and running in an easterly direction on Sixteenth Street to Stephens street, thence southerly on Stevens to Austin, then easterly on Austin Street to Williams Street.

66 Also, commencing at Seventh and Scott Streets and running in a westerly direction on Seventh and Market space to Pike Streets, thence southwestwardly on Pike Street to the City limits of Lewisburg.

Referred to a Special Committee of three, Messrs. Noonan, Clarkson and Ashbrook."

67 *July* 1882, *Contract Between Covington Street Railway Company, South Covington & Cincinnati Street Railway Co.*

This agreement, entered into between the Covington Street Railway Company, a corporation under an act of the General Assembly of the Commonwealth of Kentucky, approved February 9, 1864, of the first part, and The South Covington & Cincinnati Street Railway Company, a Corporation under an act of the same General Assembly, approved January 25th, 1876, of the second part, witnesseth:

That the party of the first part, in consideration of the covenants to be performed and money to be paid by said party of the second part as hereinafter stipulated, hereby grants permission to the said party of the second part to construct and operate street railways over

the streets specified in the following routes, so far as said party of the first part may do so under the Laws of Kentucky, and the ordinances of the City of Covington, the said routes being designated as follows in a certain agreement between the said party of the first part and the city of Covington.

Greenup Street Route, or No. 1.

Commencing at the corner of Scott and Front running South to Third, east on Third to Greenup, south on Greenup to Powell, east on Powell to Madison, returning over the same route to Third Street, continuing North on Greenup Street to Second, west on Sec-
68 ond to Scott, to same place of starting; to be a single track route with turn-outs at the following intersections of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

Madison Avenue Route, or No. 2.

Commencing corner of Scott and Front, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line, a double track on Madison from Eighth to Third, turn-outs at the following intersections of streets with Madison; Robbins, Twelfth, Fourteenth and Fifteenth streets.

Pike & Banklick Street Route, or No. 3.

Running over the Madison Street Route to Sixth street, thence on sixth to Washington, south on Washington to Pike, west on Pike to Banklick, south on Banklick to Fifteenth, east on Fifteenth to Madison, a double track on Pike from Banklick to Washington, on Washington, to Sixth and on Sixth to Madison, and turnouts at the following intersections of streets with Banklick, Eleventh, Thirteenth and Fifteenth streets.

Main Street Route, or No. 4.

Running over that portion of the Madison street route from corner of Front and Scott streets to Third and Madison, west on Third to Main, south on Main to Pike, west on Pike to York, a single track with turn-outs at the following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, *Fifth and Main*, Seventh and Main, Riddle and Main, Pike and Main, Pike and York, returning over the same route.

Third Street Route, or No. 5.

Running over the Main Street route to Main, West on
69 Third to Bullock, south on Bullock to Second, returning over the same route, a single track with turn-outs at the intersections of the following streets: with Third, Philadelphia and Bullock.

And the said party of the second part, for the privileges herein

granted hereby covenants to pay at the end of each and every year, for a period of eight years, beginning August 15, 1882, the sum of two hundred and fifty dollars to the City of Covington, said city having duly authorized said party of the second part by ordinance, approved June 8, 1882, to use the streets, mentioned in said routes for street railway purposes, and the said party of the first part having obligated itself to pay the said sum of two hundred and fifty dollars annually until August 15th, 1890, to said city in consideration of the right of way over said streets, as will appear by reference to said agreement between said party of the first part and said city, dated August 15th, 1865, the payment of which sum for the year ending August 15th, 1883, and annually thereafter, until the expiration of the said term, is assumed by said party of the second part.

It is further expressly agreed that the privileges herein granted shall not be regarded as an abandonment on the part of the said party of the first part of its right to construct and operate street railways over said streets.

In witness whereof, said companies have caused their corporate names to be subscribed by their president and their corporate seals to be affixed, attested by their respective Secretaries this — day of July, 1882.

COVINGTON STREET RAILWAY COMPANY,
By JOHN A. WILLIAMSON, *President;*
B. R. MORTON, *Secretary.*
SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
By E. F. ABBOTT, *President;*
JAS. A. COLLINS, *Secretary.*

70 *Advertisement Cincinnati Daily Times, January* 4, 1865.

"To Capitalists."

The Legislature of Kentucky, having incorporated the Covington Street Railway Company, the city Council of Covington, Kentucky, on the 15th day of December 1864, passed an ordinance prescribing the terms upon which the City will grant the right of way and upon what streets the road may run, and offered the franchise to any responsible company who will pay into the City Treasury of Covington, the largest bonus for the same, and to the incorporators any expense they may have incurred in making a survey of the routes above referred to together with the maps and estimates not exceeding $100.00.

Sealed proposals will be received at the City Clerk's office up to February 1st, 1865. The ordinance above mentioned can be had at this office.

H. E. WILSON,
City Clerk of Covington.

Covington, Ky., December 29, 1864."
(Inserted from December 29 to February 1st.)

71 United States District Court, Eastern District of Kentucky.

No. 2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

Charters, Contracts, Ordinances, and Other Proceedings Relative to Street Railways in the City of Covington.

An Act to Incorporate the Covington Street Railway Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That N. C. Morse, Amos Shinkle, Jesse Wilcox, J. C. Savers, John F. Fisk and M. M. Benton, and their associates, be and are hereby created a body politic and corporate, under the name of "The Covington Street Railway Company," with perpetual succession; and by that name may contract and be contracted with, sue and be sued in all courts, and shall have a capital stock of $250.000, divided into shares of one hundred dollars each, to be subscribed as hereinafter provided.

72 2. The persons named in the first section of this act, or any three of them, shall be commissioners to receive subscription to the stock of the company, and to superintend the first election of directors; and before receiving any subscription they shall give two weeks notice thereof in some newspaper circulating in the City of Covington, of the time and place of opening the books. Five dollars per share shall be paid by the subscribers before the first election of directors; and when the election shall have taken place, said commissioners shall hand over to the directors all the papers and books in their hands belonging to the Company, and also pay over the money received on subscription. That so soon as seventy-five thousand dollars shall have been subscribed, if the books have been open one week, the commissioners may hold said election; and no subscription shall be deemed valid until the advance payment shall have been made.

There shall be elected five directors of said Company all of whom must be stockholders; and after the first election they must have held the stock for at least three months previous to the election. The annual election of the Company shall be first Saturday in January in each year, unless a different time shall be fixed by the board of directors, and those in office shall hold over, if an election should fail, until an election shall take place. At said election stockholders shall be allowed one vote for each share held three months, and upon which all calls shall have been paid; provided, no stockholder shall have more than one hundred votes, nor shall any vote while delinquent in the payment of calls on the stock.

73 The directors shall elect one of their body president, who shall possess the usual powers, and perform the usual duties of presidents of like corporations. The president and directors shall constitute one board for the transaction of business; may ordain and establish the necessary by-laws for the government of the Company and its employees, appoint a secretary and treasurer, who may also be of the board, and such other officers as they may deem proper, and take from them the requisite bonds for the performance of official duties. They shall require payments on the stock of not more than five per centum per month, till the whole shall have been paid: and if any call shall not be paid for one month after the same shall be due, the delinquent shall pay one per centum per month interest thereafter until payment: and the Company may proceed to collect the said calls by suit, or may forfeit the stock in which case the payments that have been made shall enure to the benefit of the Company. At least thirty days notice shall be given before any forfeiture shall be declared, either in a newspaper, as before mentioned, or be personal advice.

The business of this corporation shall be to construct and use railway along the streets of Covington, and in the suburbs of said city. It may construct the lines along such streets, either with single or double tract, as they may consider beneficial to the interest of the Company, and to which the city Council of said city may consent, authority for which is hereby given to said council to

74 make an agreement therefor, and out of said city into the surrounding country, and along such turnpike road as may be agreed with the turnpike companies. It may also construct tracks across the Covington & Cincinnati Bridge, and the Newport & Covington Bridge, by the consent and agreement of said companies: and may make connection with such other street railway as may be deemed advantageous and proper: and may have branches, and distinct lines, and may construct and purchase cars and other equipments for said road.

That when said Company shall have constructed a line upon any of the streets of said city, the city authorities shall not grant the right to any other company so long as this Company shall use the same, and comply with the terms and conditions of the grant. The board of directors may re-open the books for subscriptions to the capital stock of the Company, and prescribe the terms of payment: and if necessary the capital stock may be increased by the stockholders at any regular or called meeting for that purpose: and in either case due notice shall be given to the stockholders that such proposition will be made. Said board shall determine the rates to be charged upon said roads.

7. The said corporation may borrow money upon the credit thereof, to an amount not exceeding its capital stock, at a rate not greater than ten per centum per annum, and may execute bonds therefor, of not less denomination than one hundred dollars, and to secure the payment thereof by any pledge or mortgage of the property and income of the Company.

8. That the Company may purchase and hold such real and
75 personal estate as may be considered necessary in the transaction of its business, and sell and convey the same whenever its interest may so require.

9. That any person who shall wilfully place any obstruction by stones, logs, stocks, or other thing, on the tracks of said Company, or shall tear up or remove any part or portion of the tracks, or the works thereof, with the intent to obstruct the cars in passing thereon, or to throw them off the track, or shall burn or destroy any building belonging to said Company, he shall be confined in the penitentiary not less than one nor more than five years. That for the injury or destruction of any other property of said Company, the person or persons found guilty thereof shall be deemed guilty of a misdemeanor, and subject to a fine of not less than fifty nor more than five hundred dollars, or imprisonment in the county jail not to exceed six months, or both.

10. In no case shall this corporation exercise any banking privilege.

11. The General Assembly reserves the right to change, amend or repeal this act.

12. This act shall take effect from its passage.

Approved February 9, 1864.

An Act to Amend an Act Entitled "An Act to Incorporate the Covington" Street Railway Company."

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

76 1. That the eleventh section of an act entitled "An Act to Incorporate the Covington Street Railway Company," approved February 9, 1864, is hereby repealed.

2. That this act shall take effect from and after its passage.

Approved March 4, 1865.

The Ordinance of 1864.

Communications and Proceedings Previous to Its Passage.

Book "F," Page 587, November 10, 1864.

Same (Mr. Shinkle) presented a petition from the incorporators of a street railroad with the charter and route of said road. Referred to a select comtt., consisting of Messrs. Shinkle, Shutt, Arnold, Bard and Condell, to report at next meeting of the board.

To the President and Members of the City Council of Covington:

GENTS: Your petitioner would respectfully represent to your Honorable Body that they obtained from the Legislature of the State of Kentucky, at their session of 1863-4, a Charter for a Street Road

Company to be operated in the City of Covington, a copy of which is placed before you accompanying this.

Now, therefore, they, the incorporation, would respectfully request your Hon. Body to grant them the right of way to lay down the tracks along the streets as set forth in the accompany-
77 ing schedule, with the privileges necessary to operate the same.

They would further ask that the matter be referred to a Committee selected from your Body to examine the subject and report to you at their earliest convenience, the terms on which the right of way may be granted your Petitioner.

N. C. MORSE,
JOHN F. FISK.
A. SHINKLE.
JOHN WILCOX,
M. M. BENTON.

Covington, Ky., November, 1864.

Greenup Street Route—No. 1.

Comencing corner of Scott and Front or First, running south to Third, east on Third to Greenup, south on Greenup to Powell, east on Powell to Scott, returning over the same route to Third Street, continuing north on Greenup to Second and west on Second to Scott, to same place of starting. To be a single track route, with turnouts at the intersection of the following streets with Greenup: Third, Fifty, Seventh, Eleventh, Thirteenth and Powell.

Madison Street Route—No. 2.

Commencing corner of Scott and Front or First, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line. A double track on Madison from Eighth to Third and turnouts at the following intersections with Madison: Robinson, Twelfth, Fourteenth and Fifteenth Streets.

Pike and Bank Lick Street Route—No. 3.

Running over the Madison Street Route to Pike, west on
78 Pike to Bank Lick, south on Bank Lick to Fifteenth, east on Fifteenth to Madison. A double track on Pike from Bank Lick to Madison and turnouts at the following intersections of streets with Bank Lick: Eleventh, Thirteenth and Fifteenth Streets.

Main Street Route—No. 4.

Running over that portion of the Madison Street Route From First and Scott to Third and Madison, west on Third to Main, south on Main to Pike, west on Pike to York. A single track with turnouts on the following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York, returning over the same route.

Third Street Route—No. 5.

Running over the Main Street Route to Main and west on Third to Bullock, south on Bullock to Second, returning over same. Single tracks with turnouts on the intersections of the following streets with Third: Philadelphia and Bullock.

Distances of Travel on the Following Routes:

	Feet.	Miles.
Greenup Street Route, or No. 1, from intersection of Powell and Madison to corner of Scott and Front Streets	7,675	1 45/100
Madison Street Route, or No. 2, from corporation line to Scott and Front Streets	10,675	2 2/100
Pike and Bank Lick Route, or No. 3, from intersection of Fifth and Madison to corner of Scott and Front Streets	9,400	1 78/100
79 Main Street Route, or No. 4, from corporation line to Pike Street, over Main and Third to corner of Scott and Front Streets	8,000	1 50/100
Third Street Route, or No. 5, from corner Second and Bullock to corner of Scott and Front Streets	6,450	1 22/100

Recapitulation.

	Feet.
Route No. 1	7,675
Route No. 2	10,675
Route No. 3	9,400
Route No. 4	8,000
Route No. 5	6,450
Total	42,200
Or 7 99/100 miles.	

The following is the number of feet of track in the streets comprising said routes:

Route No. 1.	Feet.
Powell Street, from Madison to Greenup	950
Greenup Street, from Powell to Third	5,475
Greenup Street, Third to Second	450
Second Street, Greenup to Scott	450
Scott Street, from First to Third	800
Third Street, from Scott to Greenup	450
	8,575
Eight turnouts, 60 feet each	480
Total	9,055

Route No. 2.	Feet.
Madison, from corporation line to Powell	3,000
Madison, from Powell to Eighth	3,150
Madison, from Eighth to Pike	800
Madison, from Pike to Third	1,525
Third, from Madison to Scott	450
Double track on Madison from Eighth to Third	2,325
Eight turnouts, 60 feet each	480
Total	11,730

Route No. 3.	Feet.
80 Fifteenth, from Madison to Bank Lick	1,200
Bank Lick, from Fifteenth to Riddle	2,875
Pike, from Riddle to Madison	1,600
Pike Street double track from Riddle to Madison	1,600
Five turnouts, 60 feet each	300
Total	7,575

Route No. 4.	
Pike, from Corporation line to Main	700
Main, from Pike to Riddle	600
Main, from Riddle to Third	2,700
Third, from Main to Madison	1,800
Eight turnouts, 60 feet each	480
Total	6,280

Route No. 5.	
Bullock, from Second to Third	400
Third, from Bullock to Main	2,000
Four turnouts, 60 feet each	240
Total	2,640

Recapitulation.	Feet.
Route No. 1	9,055
Route No. 2	11,730
Route No. 3	7,575
Route No. 4	6,280
Route No. 5	2,640
Total	37,280

Endorsed: "Referred to a select committee of Shinkle, Shutt, Arnold, Bare and Condell. Nov. 10 bid. Dec. 1 rept. Special Metg. Dec. 5."

81 Book "F," Page 592. December 1, 1864.

Same (Mr. Shinkle) presented a report on the petition of the incorporation of a street railroad. On motion of Mr. Rose it was resolved that when the council adjourn it adjourns until next Monday night at 7 o'clock to consider the above report.

Book "F," Page 593. December 5, 1864.

Mr. Shinkle, from special committee, to whom was reported the charter and petition of the incorporators of a street railroad company, reported in favor of granting the prayer of the petitioners, with the exception of that portion of Madison Street Route running from Madison on Pike to Washington Street's. As a substitute the committee recommended that the petitioners be granted the right of way on Sixth Street, from Madison to Washington Street; thence on Washington to Pike Street to the line first designated. On motion the report was concurred in, and the Committee on Law in conjunction with the City Attorney, was instructed to report an ordinance granting the street railroad company the franchise asked for in their petition, agreeable to the report of the committee.

Report of Committee to the President and Members of the City Council of Covington.

82 GENTLEMEN: The Committee on Law, to whom was referred the report of the Special Committee on Street Railroads, with instructions to report an ordinance defining the obligations of any company or individual to whom privilege may be granted to use the streets of the city for street passenger railroad purposes, and the regulation by which any such company or individual shall be governed in running the same, would ask leave to introduce for that purpose the following ordinance.

Respectfully,

W. H. CONDELL,
Chairman, Committee on Law.

The Ordinance of 1864.

Book "F," Page 598. December 15, 1864.

Mr. Condell, Chairman of Committee on Law, to whom was referred the report on the street railroad, with instructions to report an ordinance, reported an ordinance presenting the terms and conditions of street passenger railroads within the city of Covington, which had its first reading, when on motion the council resolved itself into a Committee of the Whole, Mr. Shutt in the chair, for the purpose of considering the above ordinance. The committee arose, and through their chairman, reported that they had examined the ordinance carefully, and adopted it section by section, and ask for

your concurrence and adoption. On motion, the report of the committee was received and adopted and the ordinance was read the third time and adopted unanimously as follows:

83 An ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington:

Section 1st.

Be it ordained by the City Council of Covington that any company organized for the purpose of laying down rails for running street passenger cars to be drawn by horses or mules through the stree's of Covington, shall be guided, governed and regulated by the following conditions, and such restrictions as Council may hereafter pass.

Section 2nd.

No company shall be permitted to law down a track through any of the streets of said city without first obtaining the consent of the City Council, designate the company to whom the privilege is granted and the streets through which said line shall pass.

Section 3d.

All tracks laid shall be of the guage of five feet and two inches and of the most approved rail, which shall be not less than four-inch, tram, and not more than three-quarter inch flange, the same to be laid according to the direction of the City Council, and in such manner as to be no impediment to the ordinary travel and use of the streets, with suitable bridges at all the gutters, so as to permit the flow of water under the same, and such grades as are or may be hereafter established by the City Council. Any company to whom any privilege be granted shall first enter into a good and suf-
84 ficient bond in the penal sum of $50,00- with the city, said bond to be drawn by the City Attorney, and to be endorsed by not less than five responsible freeholders and residents of the city as sureties, to keep the streets between the rails in as good repair as the balance of the street to the satisfaction of the City Council, and also that no motive power except horses and mules shall be used upon any street, and if any company or individual to whom any privileges shall be granted shall fail to keep that portion of the street occupied by their track in good and sufficient repair or shall refuse to pay into the city treasury the amount of tax or license fixed by council for the privilege of using, as required by this section, the City Council shall have the right to prevent the use of said street or streets by removing the rails therefrom.

Section 4th.

And upon the further condition that any company or individual to whom any privilege may be granted, shall place and continue

upon said street good cars with all the modern improvements for comfort and convenience of passengers, and that they run cars thereon as often as the public convenience may require.

Section 5th.

And provided any such company or individual shall not charge more than five (5) cents for each passenger on each route.

85

Section 6th.

And provided that no company or individual to whom any privilege may be granted shall assign or transfer their franchise in said road or roads without first obtaining the consent of the City Council thereto.

Section 7th.

And provided further that the City of Covington shall not be held liable to any company or individual for the breakage of any sewer, gas, or water pipe or from any delay in the transportation of passengers that may be caused by the making of sewers or culverts or laying of water or gas pipes or the necessary repairing of the same, or from any other delay or damage that may be caused by fire or otherwise. But any such company or individual shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of their agents or servants in the management, construction or use of said track or street. And any such company or individual shall indemnify and hold the city harmless from any damage that may be claimed by property holders or by any person or persons on account of laying of said track or in the use or by reason thereof, or by running the cars thereon.

* Section 8th.

Provided, any company or individual to whom privilege may be granted as aforesaid, shall within fifteen days after the award granting such privilege, come forward and sign the proper contract agreeing to abide by these stipulations, and agreeing further to
86 complete and put in operation and have cars running thereon not less than two and a half miles of road within twenty-four months after signing the necessary obligation, contracts and stipulations as required by this ordinance.

Section 9th.

And be it further ordained that the following specifications regu-

*This section of the ordinance is as originally written and as it appears from the original now in the office of the City Clerk, is as follows:

lating the running of street railroads in Covington be required of any company or individual taking out license under the provisions of this ordinance, viz:

1st. No car shall be drawn at a greater speed than six (6) miles an hour.

2d. While the cars are turning the corners from one street to another, the horses or mules shall not be driven faster than a walk.

Section 8th.

Provided, any company or individual to whom privilege may be granted as aforesaid, shall within fifteen days after the (words "passage of this ordinance" stricken out, and the word "award" inserted) award granting such privilege, come forward and sign the proper contract agreeing to abide by these stipulations, and agreeing further to complete and put in operation and have cars running thereon not less than two and a half miles of road within twenty-four months after signing the necessary obligations, contracts and stipulations as required by this ordinance.

87 3d. No car shall be allowed to stop on a cross walk or in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the streets.

4th. When the conductor of any car is required to stop at the intersection of streets to receive or leave passengers, the cars shall be stopped so as to leave the rear platform slightly over the crossing.

5th. The conductors and drivers of each car shall keep a viligant watch for all teams, carriages, persons on foot, and especially children, either on the track or moving towards it, and on first appearance of danger to such teams or persons or other obstructions, the car shall be stopped in the shortest time and space possible.

6th. The conductor shall not allow ladies and children to enter or leave the cars while in motion.

7. Conductors shall announce to the passengers the names of the streets as the cars pass.

8th. The cars after sunset shall be provided with signal lights.

9th. The cars shall be entitled to the track, and any vehicle upon the track of said company shall turn out when any cars come up, so as to leave the track unobstructed when requested by the driver of any car.

10th. Provided, that if any person or persons shall have cause to remove any iron safe or other large and heavy substance, they shall be allowed a sufficient time to load and unload the same without being liable or amenable for such construction.

88 Section 10th.

Be it further ordained the franchise for street railroads as provided for in this ordinance and according to the plan of roads as laid down in the schedule of the incorporators of the Covington Street Railroad Company presented to this Board with their petition now

on file in the City Clerk's office be granted to any responsible company who will pay into the city treasury of Covington the largest bonus for the same and to the incorporators any expense they may have incurred in making a survey of the routes above referred to, together with maps and estimates not exceeding $100.

Section 11th.

Be it further ordained that the City Clerk be instructed to advertise in the Cincinnati Gazette, Commercial Times and one paper in Pittsburg and Philadelphia until February 1, that sealed proposals will be received up until the first of February next, for the franchise above named, and that the same will be awarded to the highest and best bidder at the first meeting of Council thereafter.

It being understood that the present incorporators propose to transfer their rights and privileges in and to the charter obtained by them for a street railroad in this city, to the company or individual offering the largest bonus for the above mentioned franchise.

Section 12th.

Be it further ordained that the Company to whom this
89 franchise is granted may have the privilege of repairing the streets between the rails by bouldering, when they may wish to do so.

Section 13th.

This ordinance shall continue and be in force from and after its passage. All contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years.

Passed by the following vote: Yeas—Mr. President, Messrs. Arnold, Bare, Bowen, Beam, Condell, Harper, Kaiber, Maurer, Rose, Reed, Shinkle, Shutt, Taylor and Von Hoene. Nays—None.

On motion, the Clerk was instructed to advertise the above ordinance in the Volksblatt, Times and Saturday Evening American.

The Sherlock or Covington Street Railway Grant.

The Bid of Thomas Sherlock and Malcolm McDowell.

To the Honorable City Council of the City of Covington, Kentucky:

In conformity with advertisement of December 29, 1864, inviting proposals for street railroad routes in the City of Covington, Kentucky, we, the undersigned, propose to pay into the Treasury
of the said city a bonus of two hundred and fifty dollars
90 ($250.00) per year for the grants under the ordinance passed by your honorable body, prescribing the routes and regulating the terms for street railroads in said city, and for the franchise of the Covington Street Railroad Company. We propose further, to pay the expenses incurred by the incorporators of said company

in making a survey and maps and estimates of said street railroad routes, not exceeding one hundred dollars.

THOS. SHERLOCK,
MALCOLM McDOWELL,
For Themselves and Their Associates.

Cincinnati, February 1, 1865.

The Bid of Shinkle and Wilcox for the Incorporators of The Covington Street Railway Company.

To the President and Members of the City Council of Covington:

GENTLEMEN: The undersigned, incorporators of the Covington Street Railroad Company, beg leave to present the following for your consideration:

For the right to build and operate a street railroad on the streets named and according to the plan laid down in schedule accompanying this petition to your honorable body, asking the right of way on certain streets now on file in the City Clerk's office.

They agree to give bond, with good and sufficient security, to build roads on the various designated streets, according to the terms and requirements of the ordinance granting the right of way and comply in all things with the requirements of the provisions
91 there laid down, and they further agree to pay the same license for each and every car in use as is now charged on omnibuses.

AMOS SHINKLE,
JESSE WILCOX,
For the Incorporators.

Covington, 9th February, 1865.

Proceedings of Council Rejecting Bid of the Incorporators of the Covington Street Railway Company and Accepting the Bid of Thomas Sherlock and Malcolm McDowell.

Book "F," Page 615. February 23, 1865.

Mr. Arnold presented the proposals for constructing and running a street railroad in the city, which were opened and read, and on motion the bid of Thomas Sherlock and Malcolm McDonald and their associates was accepted by the following vote: Yeas—Mr. Schutt, Asmann, Arnold, Andrew, Bowen, Fallis, Harper, Hoorkamp, Knoll, Mauser, Shinkle, Taylor, Reed. No: —. They proposing to pay into the city treasury the sum of $250.00 per year as a bonus, also proposing to pay the expenses incurred by the incorporators of said company in making a survey, etc., not exceeding one hundred dollars. The Committee on law, in conjunction with the City Attorney, was instructed to take bonds for the performance of the contract.

92 Book "F," Page 666. July 27, 1865.

Same (Mr. Bowen) presented a memorial from Thos. Sherlock and others, the Covington Street Railway Company, asking council to pass a resolution or ordinance to be inserted and made part of the contract for the safety of both parties in the construction of the street railway.

Referred to the Committee on Law, in conjunction with the City Attorney, to report an ordinance at their discretion.

Book "F," Page 673. August 3, 1865.

Mr. Bowen reported the following ordinance, which was read, and the yeas and nays being called, was passed as follows:

An ordinance to amend an ordinance approved December 15, 1864, entitled an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington.

Sec. 1. Be it ordained by the City Council of Covington, that the ordinance * * * be amended as follows: The license fee for each car shall be the highest price now fixed, or that the City Council from time to time may fix, not exceeding ten dollars, to *pe* paid for license for a hack, omnibus or other vehicle of like capacity as a car.

Sec. 2. At the expiration of the period of twenty-five years, the City of Covington shall again offer the same routes, or these routes with other bounds added to any or all of them, to the highest and best bidder, and if any person or persons or company or incorporation shall make a better bid than the Covington Street Rail-
93 way Company, such bid shall be accepted, only upon the condition that the successful bidders will take from the then owners of the roads in Covington, and pay said owners or arrange to pay them therefor, to the satisfaction of said owners, all the property of every kind belonging to said owners, upon and pertaining to the then existing routes, providing the owners thereof can and will deliver the same free from incumbrance at a valuation to be fixed by three disinterested and sworn parties, or by a majority of them to be selected, one by the City Council of Covington, one by the owners, and one by the bidder, but should said bidder or said owners, or both fail or refuse, within ten days after the acceptance of the bid, to select a valuer or valuers, and should said bidder fail or refuse to take and pay for said property or fail to arrange to pay for the same as aforesaid within twenty days after the return of the valuation to the City Council, then the owners of the road shall be entitled to take the bid provided that the City Council shall have the right to reject all the bids, and offer the routes again, but upon the principles set forth. Provided, also, that the present company shall be entitled to continue to run the road upon the then existing conditions until a new bid has been accepted.

Sec. 3. The contract between the city and the present company shall contain the above stipulations and conditions.

Passed by the following vote: Yeas—Mr. President, Asmann, Arnold, Andrews, Bowen, Fallis, Hovekamp, Rose, Shinkle and Taylor; 10. Nays—0.

94 *Bond of the Covington Street Railway Company to the City of Covington.*

Book "F", Page 711. November 30, 1865.

Same (Bowen) presented the following bond and contract of the Covington Street Railway Company, which was received and accepted.

Know all men by these presents: That the Covington Street Railway Company, as principal, and Jesse Wilcox, David Banning, Vincent Shinkle, N. B. Stephens, and Amos Shinkle, as securities, are held and firmly bound unto the City of Covington in the penal sum of fifty thousand dollars, for the payment of which well and truly to be made we hereby jointly and severally by these presents bind ourselves, our heirs, executors and administrators.

In Testimony Whereof we have hereunto set our hands and seals this, the 16th day of August, 1865. The conditions of the above obligations is such that whereas the said City of Covington has granted and by these presents hereby does grant unto the said Covington Street Railway Company permission to construct and operate a street railway in said city upon certain terms and conditions contained in an ordinance passed on the 15th day of December, 1864, entitled an ordinance prescribing the terms and conditions of street passenger railways within the City of Covington, and amendment thereto dated August 3, 1865, and upon the further condition that the said company shall at the end of each year thereafter, for a period of twenty-five years, pay into the city treasury the sum of two hundred and fifty dollars. Among the terms in said ordi-
95 nance are the following: That any company to whom any privilege shall be granted, shall first enter into a good and sufficient bond in the penal sum of fifty thousand dollars to keep the street between the rails in as good repair as the balance of the street, to the satisfaction of the City Council, and that no motive power except horses and mules shall be used upon any street, and other conditions hereinafter specified as to be done and performed by said company under the penalty aforesaid. Now, therefore, if the said street railway company shall keep the street between the rails upon each street occupied by them for railway purposes in as good repair as the balance of such streets is kept, and such repairs shall meet the approbation, and shall be to the satisfaction of the City Council of Covington, and said Company shall use no motive power except horses and mules upon any of said streets, and shall from time to time pay into the city treasury such rates of tax as may be assessed and levied by the City Council upon the property in said city of said railway company, and shall pay into the city treasury such license fee as may be fixed upon their cars by said City Council, and shall place and continue upon all streets used by it, good cars, with all the modern improvements for the comfort and convenience of passengers, and shall — them as often as the public convenience may require, and shall hold the city harmless from all costs and damages by the breakage of any sewer, gas or water pipe,

or claim of any property holder or holders by reason of the construction or running of said railway or the cars thereon, and
96 & 97 from all costs and damages to any person or property, caused by the carelessness, neglect or misconduct of any agent, servant, owner or proprietor of said railway, and shall in all other respects fully comply with all the obligations, restrictions and stipulations in said ordinance binding upon the said Company, or the operator of said railway to perform in the manner and form and at the term therein set forth, and shall pay into the treasury of said city annually at the end of each year from and after this date, during a period of twenty-five years, the sum of two hundred and fifty dollars, the bonus for the privilege granted to the said Company, then this obligation shall be null and void; otherwise to remain in full force and effect. This obligation shall take effect and be in force and binding upon the parties thereto, on and after the 9th day of March, 1865. In Testimony Whereof, the said Company by its President and Secretary, under its official seal, hath hereunto set its signature the day and date above mentioned, and the securities have hereunto set their respective hands and seals on the day and date above mentioned.

THOS. SHERLOCK, *President.*
HENRY LEWIS, *Secretary.*
JESSE WILCOX.
D. BANNING.
A. SHINKLE.
V. SHINKLE.
N. B. STEPHENS.

Book "F", Page 712. November 30, 1865.

Same (Mr. Bowen) presented the agreement between Covington Street Railway Company and the City of Covington, which
98 was accepted, and the following resolution was adopted:

Resolved, that the President of the City Council be authorized to sign the contract with the Covington Street Railway Company, and affix the seal of the city thereto, and that the contract be accepted and spread upon the records of the city and the original be filed away.

Agreement Between the City of Covington and the Covington Street Railway Company.

Article of Agreement made and entered into this 15th day of August, 1865, by and between the City of Covington and the Covington Street Railway Company.

Witnesseth: That whereas, the City Council of said city by resolution passed on the 23d day of February, 1865, accepted the bid and proposals of Thomas Sherlock and Malcolm McDowell, and their associates, for constructing and operating a street railroad in said city, and whereas the said Sherlock and McDowell and their as-

sociates are the owners of the stock, and franchises of the said Covington Street Railway Company, and have assigned and transferred their rights and interest under said accepted proposal to said Company; and, therefore, in consideration of the premises, the said City of Covington doth hereby grant to said Covington Street Railway Company permission to construct and operate railways upon the terms and conditions contained in an ordinance of said City Council passed on the 15th day of December, 1864, entitled, an ordi-
99 nance prescribing the terms and conditions of street passenger railroads within the City of Covington, and amendment thereto dated August 3, 1865, and the provisions of the charter of the said city and the charger of the said railway company; and in pursuance thereof, on the following streets of said city, or upon such of said streets, alleys or public grounds as the city may have control of or condemned for public uses as the City Council, with the consent of said Company, may designate.

It is understood that the city does not grant the absolute right of way on Madison Street from Twelfty Street to the corporation line, but she does grant the right to use the same as far as she has control over it.

The turnouts may be changed from one street to another and to different points on the same street by and with the consent of both parties hereto first had and obtained. The routes at present designated are as follows:

Greenup Street Route, or No. 1.

Commencing at the corner of Scott and Front, running south to Third Street, east on Third to Greenup, south on Greenup to Powell, east on Powell to Madison, returning over same route to Third Street; continuing north on Greenup to Second, west on Second to Scott, to same place of starting. To be a single track route, with turnouts at following intersection of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

100 Madison Street Route, or No. 2.

Commencing at the corner of Scott and Front, running south on Scott to Third, West on Third to Madison, south on Madison to corporation line. A double track on Madison from Eighth to Third; turnouts at following intersections of streets with Madison: Robbins, Twelfth, Fourteenth and Fifteenth Streets.

Pike and Banklick Street Route, or No. 3.

Running over the Madison Street Route to Sixth Street, west on Sixth to Washington, south on Washington to Pike, west on Pike to Banklick, south on Banklick to Fifteenth Street, east on Fifteenth to Madison. A double track on Pike from Banklick to Washington, on Washington to Sixth, and on Sixth to Madison and turnouts at the following intersections of streets with Banklick: Eleventh, Thirteenth and Fifteenth Streets.

Main Street Route, or No. 4.

Running over that portion of the Madison Street Route from corner of Front and Scott to Third and Madison, west on Third to Main, south on Main to Pike, west on Pike to York. A single track with turnouts at the following intersections of streets: Third and Johnston, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York, returning over the same route.

Third Street Route, or No. 5.

Running over the Main street Route to Main, West on Third to Bullock, south on Bullock to Second, returning over the
101 same route. Single track, with turnouts at the intersections of the following streets with Third: Philadelphia and Bullock.

And the said Covington Street Railway Company for the privileges herein granted, agrees and binds itself to pay at the end of each and every year, during a period of twenty-five years, the sum of two hundred and fifty dollars; and to perform all the provisions, requirements and conditions of said ordinance, and amendment, and the charter of said city, and such other orders and ordinances as the general welfare and experiences may seem to require, and as may be adopted and ordained by the City Council in reference to said railway company, and binding upon its part, to be performed, or upon the operator of said railway and the lessees of the above mentioned routes under said ordinance and amendment and others that may hereafter be ordained. All the provisions of said ordinance and amendment are hereby, by reference, made part thereof as fully and with the same binding force as if the same were inserted here at length.

The said Company shall keep in repair all of the crossings and intersections used by them; and it is further stipulated that said Company shall build and put into complete operation two miles of said road within thirty months from and after the 9th day of March, 1865, and that said Company shall construct its road with rails having a tram not less than four inches in width and a flange of not more than three-fourths of an inch in height, and a gauge of what is known as five feet two inches. This contract shall
102 continue in force for a period of twenty-five years from its date.

This contract shall take effect and be in force and binding upon the parties hereto on and after the 9th day of March, 1865.

In witness whereof the said City of Covington, by its President, under the seal of said city, has affixed its signature, and that said Covington street railway company has caused its corporate seal to be affixed hereto, and attested by its President and Secretary the day and year first above written.

THOMAS SHERLOCK, *President.*
[SEAL.] HENRY LEWIS, *Secretary.*

A copy.
Attest:
GEO. H. DAVISON, *City Clerk.*

Book "G", page 234. July 18, 1867.

Mr. Ellis, Chairman of the Committee on Law, to whom was referred the petition of property holders on Madison Street, between Eighth and Twelfth Streets in reference to a double street railway track between said streets on Madison Street, with intersections to alter the contracts in accordance with the petition, reported the following resolution, which was adopted:

Resolved by the City Council of Covington: That the existing contract of the city with the Covington Street Railway Company, dated August 15, 1865, be and the same is hereby so modified (in accordance with the petition of property holders on Madison
103 Street, between Eighth and Twelfth Streets) as to allow said Company to lay a double track on Madison Street from Eighth to Twelfth Street as a part of the route designated in the aforesaid contract as Madison Street Route, or No. 2, provided, however, that nothing herein contained shall be so construed as to authorize the portion of the double track hereby allowed to be put down to be estimated or counted as part of the two miles of track required to be laid down and operated by said contract within thirty months from and after the 9th day of March, 1865.

Resolution Cancelling Bond of the Covington Street Railway Company, and Substituting a New Bond.

Book "G", page 244. August 8, 1867.

Leave was granted Mr. Shinkle to introduce the following resolution, which was adopted:

Resolved by the City Council of Covington, that the bond executed by Thomas Sherlock as President of the Covington Street Railway Company, as principal, and Jesse Wilcox, D. Banning, Vincent Shinkle, N. B. Stephens and Amos Shinkle, as securities, on the 16th day of August, 1865, which is recorded in the office of the Clerk of the City, in Record Book "F", page 711, among the minutes of the regular meeting of council of November 30, 1865, be and the same is hereby cancelled and the obligation thereof declared no longer binding upon said parties.

Same (Mr. Shinkle) presented the following obligation and
104 bond, which was read, and on motion it was received and approved.

The Covington Street Railway Company hereby acknowledges itself indebted to the City of Covington in the sum of ten thousand dollars, to the payment of which sum on demand said Company by these presents binds itself and its successors for value received.

But the foregoing obligation is on the following conditions, to-wit: On the 16th day of August, 1865, the said Company as principal, with Jesse Wilcox, D. Banning, Vincent Shinkle, N. B. Stephens and Amos Shinkle, as securities, executed a bond to said City of Covington in the penal sum of fifty thousand dollars, conditioned for the per-

formance of certain duties therein specified, which bond has been recorded on the record book of said city in the clerk's office thereof in Record Book or Minute Book "F", page 711, and the same as therein recorded is hereby referred to and made part hereof; and by agreement between said parties, all of the signers of said bond have been released from the obligations thereof in view of the execution of this bond, and by said city, in consideration that this bond should be executed in lieu thereof for the convenience of all parties, and to prevent litigation which is likely to arise between said parties out of the character of said bond. Now, if the said Covington Street Railway Company shall in all respects comply with and perform all the duties required to be performed and done by the obligors in the bond aforesaid, and for the period therein specified, then this obligation is to be void, but otherwise it is to remain in full force
105 and virtue in law.

In witness whereof the said Covington Street Railway Company has hereto signed its name by Thomas Sherlock, President thereof, and hath caused the corporate seal thereof to be hereto set, the same being attested by Henry Lewis, the Secretary thereof, this 8th day of August, 1867.

COVINGTON STREET RAILWAY COMPANY,
By THOMAS SHERLOCK, *President.*

Attest:
HENRY LEWIS,
Secretary.

Book "G", page 280. October 8, 1867.

Same (Mr. Clarkson) offered the following resolution, which was adopted, viz:

Resolved that the Committee on Internal Improvements be instructed to bring an ordinance to repair Madison Avenue from south side of Pike Street to the south side of Twelfth Street, by repairing pavement and macadamizing, except that portion which is to be kept in repair by the Covington Street Railroad Company.

Same (Mr. Clarkson) offered the following resolution, which was adopted:

Resolved that the petition of the Covington Street Railway Company for the right to extend their track on Scott Street from Third to Fourth Street; thence on Fourth Street to connect with the tracks of the proposed Newport Street Railway Company, be and the same is hereby granted to them, the said Covington Street Railway Company, subject to the same terms and conditions as are now
106 imposed on tracks laid and hereafter to be laid under the ordinance granting them, the said Covington Street Railway Company, the privilege of laying tracks in the City of Covington, dated February 23, 1865.

Provided, the street railroad company will keep the streets in repair within their extreme rails and ten inches on the outside of said extreme rails.

The Abbott Grant, Afterwards Operated by The Covington and Cincinnati Street Railway Company.

Letter From The Covington Street Railway Co. Protesting Against The Grant of Another Street Railway Franchise.

Office: Covington Street Railway Co.

May 13, 1869.

To The Honorable the President and Members of the Common Council of the City of Covington:

The Covington Street Railway Company represents to your honorable body that this Company was chartered by an act of the General Assembly of the Commonwealth of Kentucky, approved February 9, 1864, of which the incorporators were: N. C. Morse, Amos Shinkle, Jesse Wilcox, J. C. Sayers, John F. Fisk and M. M. Benton.

The power conferred upon this corporation was to construct
107 and use railways along the streets of Covington and in the suburbs of said city, using such streets as the Company might consider beneficial to its interests, having first obtained the consent of the City Council.

It was also empowered to cross the Covington & Cincinnati Bridge, also the Newport & Covington Bridge, to make connection with roads in Cincinnati, Ohio, and Newport, Kentucky. It was also authorized to construct branches and distinct lines in the City of Covington.

This franchise evidently covers Every Street in the City of Covington over which the City Council might consent that a road should be constructed.

The council, in the charter, is authorized to give its consent to this road and No Other.

The original incorporators notified the council that they did not wish to construct the road, empowered the City Council to offer the franchise to any person or persons who would pay the largest bonus into the treasury of the City of Covington therefor.

On December 29, 1864, the City Council passed an ordinance prescribing the terms under which the grantees under that franchise should be allowed to build a railway in the streets of the City of Covington. By the tenth section of the ordinance the council offered the franchise "to any responsible company who would pay into the city treasury the largest bonus for the same and to the incorporators" (those above mentioned). "Any expense they may
have incurred in *in* making surveys of routes, maps and esti-
108 mates not exceeding $100.00." By the eleventh section, the City Clerk was directed to advertise in the Cincinnati Daily Commercial Gazette and Times, in the newspapers of Pittsburg and Philadelphia for bids up to February 1, 1865.

For which franchise Thos. Sherlock, Malcolm McDowell and associates bid for said franchise the sum of $250.00 per year for

twenty-five years, and also to pay said incorporators said expense not exceeding $100.00.

This proposition was accepted by the unanimous vote of the council, for the performance of which contract the City Council required and the purchasers required a bond in the penal sum of $50,000.00, secured by four residents and freeholders in the City of Covington, worth at this time in the aggregate of $1,000,000.00, which bond is still in full force. The franchise having thus been secured under all the solemnities known to the law, the present company, relying upon the good faith of the city purchased the franchise at an additional bonus of $25,000 and proceeded to construct and equip the road and put the same in good running order to the acknowledged satisfaction of the City Council.

The enterprise was in fact, as the citizens of Covington should, by declining to invest a single dollar in it, one of extreme hazard.

Up to the present hour this company has endeavored to comply promptly with every requirement of the contract and every suggestion or request made known to it by your honorable body.

109 The road has existed, not greatly prospered. It has looked to the future for returns to the large expense incurred in the present. At the opening of the present spring this Company promptly put its track in order, and was making provision to extend its track over its various routes as rapidly as the wants of the city and the requirements of travel would justify such investment. The Company has learned from the newspapers that individuals have proposed, and the council has now under consideration, the granting of a new route now hostile to the interest of this Company, violative of its purchased rights, aimed, indeed, at its great injury and intended destruction, of which probably your honorable body is not fully informed.

One of the routes granted to this Company runs on Scott Street; other routes extend along Madison and Greenup Streets. To run a line between the last two named streets would as effectually damage this Company as would a track running upon the identical streets granted to and used by this Company.

This Company suggests then:

If the granting of the pending application be not a clear violation in law, of the right sold by the city to this Company, would it not be a breach of that perfect good faith and fair dealing that ought to exist as well between incorporations as between gentlemen. The proposed route, if not intended by its projectors, would have the effect to at first paralyze and finally to destroy the franchise

110 Bought from the city by This Company.

This Company is unwilling to believe that your honorable body will, after mature reflection and full investigation, purposely violate either a legal contract or its good faith, pledged to this pioneer company, which was established for the mutual benefit of itself and the people of the City of Covington, and, therefore, has directed this communication to be addressed to your honorable body

in the hope that it will be received and heeded in the kindly spirit in which it is made.

THE COVINGTON STREET
RAILWAY COMPANY,
By Its President, JOHN F. FISK.

Application of Abbott and Associates.

December 13, 1869.

To the City Council, Covington, Ky.:

The undersigned respectfully petition your honorable body to grant them the right to construct and operate a street railroad single track with necessary turnouts over the following streets, to-wit: Commencing at the corner of Scott and Fourth Streets, and running thence west along Fourth Street to Bakewell Street; thence south on Bakewell Street to Riddle Street; thence west on Riddle Street to Philadelphia Street; thence south on Philadelphia Street to the Lexington Pike. If the above rights are granted, we will commence building the road within thirty days and complete the same within one year.

E. F. ABBOTT.
S. J. REDGATE.

111 *Proposition of the Covington Street Railway Company to the City Council of Covington.*

To Messrs. M. P. Smith, Jas. I. Cushing, and Thos. H. Kennedy. Committee appointed to confer with the Covington Street Railway Company as to street railroad extensions, and Nicholson pavement upon the space between the rails of this Company on Madison Street, extending from Pike to Eleventh Street.

GENTLEMEN: This Company takes this occasion to say that the council of this city, through you, has manifested a spirit of justice and fair dealing, which the subjoined proposition fully reciprocates, as we think will be acknowledged by the body you have the honor to so faithfully represent. After the free consultation held this morning between yourselves and the directors of this Company, you requested that they should put their desires and their intentions in the form of a proposition, which is most cheerfully done.

Under the contract entered into by and between the City of Covington and this Company on the 15th day of August, 1865, only five of the routes held by this Company under its charter were designated. Among them were the following routes:

Greenup Street Route, or No. 1—Commencing at the corner of Scott and Second Streets, running south to Third, east on Third to Greenup, south on Greenup to Powell, west on Powell to Madison, returning over the same route to Third Street continuing north on Greenup to Second Street, west on Second to Scott, to place of start-

ing. To this route the Company desires, with the concurrence of the City Council to make the following extension, thus:
112 Leaving said route in the intersection of Powell and Scott Streets, extending thence south on Scott Street to the intersection of Scott and Sixteenth Streets, extending thence east on Sixteenth Street to the intersection of said street with Stevens Street; extending thence south on Stevens Street to the intersection of said Street with Seventeenth Street; thence east with and along Seventeenth Street into Austin Street; thence along Austin Street to the Licking River. A single track, with turnouts and turntables at such places as may be conveniently necessary to go and return on the same route.

Main Street Route, or No. 4.—Running over that portion of the Madison Street Route from the corner of Second and Scott to Third and Madison, west on Third to Main, south on Main to Lexington Pike, west on Pike to York.

This company desires also to add to No. 2 or Madison Street Route the privilege of laying track on Twelfth Street from Madison to Banklick Street, with privilege of putting down a turntable in Twelfth Street which shall not interfere with travel.

There is no time prescribed within which any of the routes at present designated shall be completed or new routes designated, the city doubtless believing that the Company would construct the designated routes and add others as rapidly as travel would make them remunerative.

This Company desires to construct the main Street Route No. 4, so far as to the Lexington Pike, within one year from this time, and the Greenup Street Route, No. 1, as far as Sixteenth
113 Street before the expiration of the year 1871, and the extension from Sixteenth Street to the end of the route within two years next thereafter, provided the streets over which the route runs shall have at that time been graded, paved and improved and received by the city. You, in the meantime, desire the Company to assist in improving Madison Street with Nicholson pavement. The Company desires to do all its means will permit it to do.

It has never yet made a dollar, not even enough to pay running expenses and the interest on its bonds.

It has looked to the future for compensation for the investments made.

It desires as soon as possibble to make an extension from Front to Fourth Street in Cincinnati, an extension as much to be desired by the City of Covington as this Company. It can in time do all these things if fostered by the city. But if opposed it can only do a portion of these things, and to do that portion a much longer time would be required. These things being accomplished the Company would be enabled to go on affording increased facilities as rapidly as the increase of travel demanded new extensions on routes now designated, or such as may be hereafter designated.

Proposition.

This Company will construct so much of the above routes in the City of Covington as is above set out, within the times above mentioned, pay the city one-half the cost of putting down Nicholson pavement on that portion of Madison Street between Pike
114 and Eleventh Streets, which lies between the rails forming the two tracks of the railroad, within one year from the time the work is received from the contractor by the city, with interest from said date.

Provided only, that the city will, in consideration of such payment, guarantee to this Company that no street railroad shall anywhere be constructed on any street next adjoining any street upon which this Company has already laid a track, or adjoining any street which has already been assigned and designated as a portion of any route already belonging to this Company, or adjoining any street which may hereafter be assigned and designated as any portion of a route to this Company, except that the city may authorize this Company to construct a street railroad along and upon such adjoining street or streets.

The council will always find this Company ready to co-operate in every movement within the reach of its means.

COVINGTON STREET RAILWAY COMPANY,
By JOHN F. FISK, *President.*

Proceeding Authorizing a Contract Between Abbott and Associates and the City of Covington.

Book "H", Page 610. December 13, 1869.

The petition of E. F. Abbott asking council to take from the table the proposition of himself and others to build a street railroad and act upon the same, was taken up and the proposition, together with all the papers concerning same, were read and discussed. The
115 following ordinance was presented, which was read, and the yeas and nays being called, passed, and is as follows, to-wit:

An ordinance authorizing a street railroad on certain streets:

Be it ordained by the City Council of Covington that all the authority and right that the City of Covington has the capacity to, be and the same is hereby granted to E. F. Abbott, S. B. Redgate and J. C. Blick, their associates, successors and assigns, to construct, hold and operate a street railroad upon and along Scott Street from Fourth Street to Sixteenth Street; Sixteenth Street from Scott Street to Madison Street; Stevens Street from Sixteenth Street to Austin Street; and Austin Street from Stevens Street to Williams Street. In case the Covington Street Railway Company shall file with this council a written agreement relinquishing their right of way on Greenup Street, from Fourth

Street to Powell Street, and along Powell to Scott Street in favor of Abbott and Company; then said Abbott and Company shall construct their road on Greenup Street instead of Scott Street, in accordance with their proposition for making the same on Scott Street; also to construct, hold and operate a street railroad upon and along Fourth Street from Scott Street to Bakewell Street; Bakewell Street from Fourth Street to Riddle Street; Riddle Street from Bakewell Street to Philadelphia Street, and on Philadelphia Street from Riddle Street to Lexington Pike.

Said grant is upon condition and in consideration of the strict and faithful performance of said grantees of all the terms, stipula-
116 lations and covenants contained in a certain written agreement made by and between said city and said grantees of even date herewith, and of record on the minutes of said council; and said grant shall determine upon failure of such performance.

Agreement.

This agreement by and between the City of Covington, Kentucky, of the first part, and E. F. Abbott, S. B. Redgate and J. C. Blick, their associates, successors and assigns, of the second part, witnesseth; That in consideration of the term, stipulation and covenants hereinafter made by the said party of the second part, the said party of the first part hereby agrees to grant unto said party of the second part all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad upon and along Scott Street, from Fourth Street to Sixteenth Street; thence upon and along Sixteenth Street to Madison Street; also upon and along Sixteenth from Scott Street to Stevens Street; thence upon and along Stevens Street to Austin Street; thence upon and along Austin Street to Williams Street.

Said railroad on all of said streets shall consist of a single track upon which the cars shall be run both ways with suitable turnouts for passing, not to exceed seventy-five (75) feet in length, at the intersection of other streets, with the streets above named, as hereinafter specified.

117 In consideration whereof the said party of the second part hereby covenants and binds itself with and to the party of the first part, as follows, to-wit:

First. The construction of said railroad shall be commenced on Scott Street within four months from the date hereof, and said railroad shall be completed and in operation on Scott Street from Fourth Street to Sixteenth Street within nine months from said date. And said railroad shall be completed and in operation on Sixteenth Street, Stevens Street, and Austin Street within one year from and after said streets shall have been graded and paved, or otherwise improved, respectively.

Second. The track of said railroad shall be of the same gauge of five feet, two inches, and the rail shall have a tram of four inches and a flange the same as is on the Covington & Newport Railway,

which flange shall be placed and kept on a level with the surface of the street outside of the track, the surface of the street within the track to be kept level with the same.

Third. The said railroad shall conform to the grade of said streets, as now established or hereafter to be established, and when the City Council of said city shall change the grade of any of said streets, as the same is now or may hereafter be established, said railroad shall be made to conform to the grade so changed.

Fourth. The said party of the second part shall, at its own expense, replace, in as good condition as it was before, any part of said streets that may be removed in the construction of said
118 railroad, and shall use due precaution to prevent the obstruction of public travel, while said railroad is being built.

Fifth. Whenever said City Council shall ordain the improvement or the rebuilding or the repair of any of said streets between the points hereinafter designated for said railroad or any part thereof between said points, the said party of the second part shall pay into the treasury of said city, immediately after said work shall have been completed and accepted by said council, such portion of the costs and expenses of said improvement, rebuilding or repair as, according to the estimate of the City Civil Engineer of said city, shall bear the same ratio to the entire cost and expense of said work, that the width of the space between the rails of said road, including the turnouts and also including the space between the turnouts and the main track, may bear to the entire width of the street from curb to curb, inclusive of the curbing.

Sixth. The said party of the second part shall, at all times, at its own expense, keep in good order and repair, with the same material and in the same manner as the remainder of the street, all the space between the rails of said railroad, including the turnouts and the space between the turnout and the main track, and also the street outside of each rail to the width of twelve inches therefrom.

Seventh. The said railroad shall be located along the center of said streets, and the necessary turnouts shall be made at such intersections of other streets and located in such manner as the
119 City Civil Engineer of said city, by direction of said City Council, may designate.

Eighth. The cars used on said railroad shall be of the best style and class in use on street railroads, and shall each be accompanied by a driver and conductor, and shall be of sufficient number and run with sufficient frequency to properly accommodate the public. The charge to each passenger on said railroad shall never be greater than five (5) cents for any distance within the city limits, except when cars may be chartered for specific purposes, and children or teachers going to or returning from school shall not be charged more than one-half the established fare.

Ninth. The said party of the second part shall hold said party of the first part harmless from all damages or claims for damages that may be sustained or made by said party of the second part, or by any other person, from the breakage of any sewer, cistern, water or gas

pipe, or for delay in transportation of any passenger that may be caused by the construction or repair of any cistern, sewer, gas or water pipe, or for any public work, or from any other cause; and the said party of the first part shall have always the right and privilege of temporarily obstructing or removing the tracks of said railroad whenever, and from such time, as may be necessary for the building, rebuilding or repairing of any cistern, sewer, culvert, water or gas pipe, street or other work ordered or authorized to be done by said City Council; but whenever any such obstruction or removal shall have been made, said party of the first part shall, as soon
120 as practicable, at its own expense, place the portion of said track so removed or obstructed, in as good condition as it was before. Said party of the second part shall also hold said party of the first part harmless for all damages or claims for damages sustained or made by any person whatever, from injury to person or property, by reason of the existence said railroad upon said streets, or by the cars or servants of said road.

Tenth. The party of the second part shall pay into the treasury of the said city, on the first day in January in each year, the sum of twenty-five ($25.00) dollars as a license tax for each and every car that may have been used on said railroad at any time within twelve months next preceding said date.

Eleventh. Upon the failure or refusal of the said party of the second part to abide and perform any of the foregoing promises and covenants by it made, in addition to the remedies established by law, it shall be lawful for said party of the first part, upon giving five days written notice, setting forth the matter complained of, to the said party of the second part, to its superintendent or other principal officer or agent, to prevent the running of the cars on said railroad, by removing the track of the same. In addition to the foregoing, the said party of the second part hereby agrees that the following rules shall govern the operation of said railroad, to-wit:

First. No motive power, except horses and mules, shall be used on said railroad, and no car shall be drawn at a greater speed than six miles an hour.

Second. No car shall be allowed to stop at a cross walk or at the intersection of a street, except to avoid collisions, or to pre-
121 vent danger to persons on the street.

Third. When the conductor of any car is required to stop at the intersection of a street to receive or leave passengers, the car shall be stopped so as to leave the rear platform slightly over the crossing.

Fourth. The conductor and driver of each car shall keep a vigilant watch for teams, vehicles, and persons on foot, (especially ladies and children), either on the track or moving towards it, and upon the first appearance of danger the car shall be stopped within the shortest time and space possible.

Fifth. The conductor shall not allow ladies and children to get upon the car or leave the car while in motion.

Sixth. The conductor shall announce to the passengers the names

of the streets, the places where the car crosses any other street railroad track.

Seventh. The cars, after sunset, shall be provided with signal lights.

And in consideration of said premises the party of the first part hereby agrees to give to the party of the second part all the right and authority that the said party of the first part has the right to grant, to construct, hold and operate, a street railroad with suitable turnouts to be hereafter located by said council; upon and along the following streets, provided the construction of the same be begun within thirty days and be completed within nine months from and after the date of this contract. Said road to be built upon the same terms and conditions expressed in this contract as to the other street railroads therein specified, except only as to the time within which said road upon the streets hereinafter specified shall be begun and completed, to-wit: Commencing at the intersection of Scott and Fourth Streets; thence west along Fourth Street to Bakewell Street; thence south on Bakewell to Riddle Street; thence west on Riddle Street to Philadelphia Street; thence south on Philadelphia
122 Street to Lexington Pike.

In Testimony Whereof, the parties of the first part, by the President of its City Council, duly authorized thereto, and the said party of the second part, by E. F. Abbott, S. B. Redgate and J. C. Blick, for themselves, their associates, successors and assigns, have hereunto set their hands, at said city, this — day of — 1869.

Said ordinance passed by the following vote: Yeas—Mr. President, Messrs. Adams, Casey, Clarkson, Cushing, Davis, Ehalt, Hoorkamp, Kearney, Kennedy, Peacher, Rose, Smith and Whittle.

The agreement made pursuant to this ordinance follows:

Book "H", Page 637. December 23, 1869.

This agreement by and between the City of Covington, Kentucky, of the first part, and E. F. Abbott, S. B. Redgate, and J. C. Blick, their associates, successors and assigns, of the second part, witnesseth: That in consideration of the terms, stipulations, and covenants hereinafter made by the said party of the second part, the said party of the first part hereby agrees to grant unto the said party of the second part all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad upon and along Scott Street, from Fourth Street to Sixteenth Street; thence upon and along Sixteenth Street to Madison Street; also upon and along Sixteenth from Scott Street to Stevens Street; thence upon and along Stevens Street to Austin Street;
123 thence upon and along Austin Street To Williams Street.

Said railroad on all of said streets shall consist of a single track upon which the cars shall be run both ways with suitable turnouts for passing, not to exceed seventy five feet in length, at the intersection of other streets with the streets above named, as hereinafter specified.

In consideration whereof the said party of the second part hereby covenants and binds itself with and to the party of the first part, as follows, to-wit:

First. The construction of said railroad shall be commenced on Scott Street within four months from the date hereof, and said railroad shall be completed and in operation on Scott Street from Fourth Street to Sixteenth Street, within nine months from said date. And said railroad shall be completed and in operation of Sixteenth Street, Stevens Street and Austin Street, within one year from and after the said streets shall have been graded and paved, or otherwise improved, respectively.

Second. The track of said railroad shall be of the same gauge of five feet, two inches, and the rail have a tram of four inches and a flange the same as is on the Covington and Newport Railway, which flange shall be placed and kept on a level of the surface of the street outside of the track, the surface of the street within the track to be kept level with the same.

Third. The said railroad shall conform to the grade of said streets, as now established or hereafter to be established, and when
124 the City Council of said city shall change the grade of any of said streets, as the same is now or may hereafter be established, said railroad shall be made to conform to the grade so changed.

Fouth. The said party of the second part shall, at its own expense, replace, in as good condition as it was before, any part of said streets that may be removed in the construction of said railroad, and shall use due precaution to prevent the obstruction of public travel, while said railroad is being built.

Fifth. Whenever said City Council shall ordain the improvement or the rebuilding or the repair of any of said streets within the points hereinbefore designated for said railroad or any part thereof between said points, the said party of the second part shall pay into the treasury of said city immediately after said work shall have been completed, and accepted by said council, such portion of the costs and expense of said improvement, rebuilding or repair, as, according to the estimate of the City Civil Engineer of said city, shall bear the same ratio to the entire cost and expense of said work that the width of the space between the rails of said road, including the turnouts and also including the space between the turnouts and the main track, may bear to the entire width of the street from curb to curb, inclusive of the curbing.

Sixth. The said party of the second part shall, at all times, at its own expense, keep in good order and repair, with the same material and in the same manner as the remainder of the street, all
125 the space between the rails of said railroad, including the turnouts and the space between any turnout and the main track, and also the street outside of each rail, to the width of twelve inches therefrom.

Seventh. The said railroad shall be located along the center of said streets and the necessary turnouts shall be made at such intersections of other streets, and located in such manner as the City Civil

Engineer of said city, by direction of said City Council, may designate.

Eighth. The cars used on said railroad shall be of the best style and class in use on street railroads and shall each be accompanied by a driver and conductor, and shall be of sufficient number, and run with sufficient frequency, to properly accommodate the public. The charge to each passenger on said railroad shall never be greater than five (5) cents for any distance within the city limits, except that cars may be chartered for specific purposes, and children or teachers going to or returning from school shall not be charged more than one-half the established fare.

Ninth. The said party of the second part shall hold said party of the first part harmless from all damages or claims for damages that may be sustained or made by said party of the second part, or by any other person, from the breakage of any sewer, cistern, water or gas pipe, or for delay in transportation of any passenger that may be caused by the construction or repair of any cistern, sewer, gas or water pipe, or for any public work, or from any other cause;
126 and the said party of the first part shall have always the right and privilege of temporarily obstructing or removing the tracks of said railroad whenever, and from such time, as may be necessary for the building, rebuilding or repairing of any cistern, sewer, culvert, water or gas pipe, street or other work ordered, or authorized to be done by said City Council; but whenever any such obstruction or removal shall have been made, said party of the first part shall as soon as practicable, at its own expense, place the portion of said track so removed or obstructed in as good condition as it was before. Said party of the second part shall also hold said party of the first part harmless for all damages or claims for damages sustained or made by any person whatever, from injury to person or property, by reason of the existence of said railroad upon said streets, or by the cars or servants of said road.

Tenth. The party of the second part shall pay into the treasury of the said city on the first day in January in each year the sum of twenty-five ($25.00) dollars as a license tax for each and every car that may have been used on said railroad at any time within twelve months next preceding said date.

Eleventh. Upon the failure or refusal of the said party of the second part to abide and perform any of the foregoing promises and covenants by it made, in addition to the remedies established by law, it shall be lawful for the said party of the first part, upon giving five days written notice setting forth the matter complained
127 of to the said party of the second part, to its superintendent or other principal officer or agent, to prevent the running of the cars of said railroad, by removing the tracks of the same. In addition to the foregoing the said party of the second part hereby agrees that the following rules *sah*ll govern the operation of said railroad, towit:

First. No motive power, except horses or mules shall be used on said railroad, and no car shall be drawn at greater speed than six miles an hour.

Second. No car shall be allowed to stop at a cross-walk, or at the intersection of a street, except to avoid collisions, or to prevent danger to persons on the street.

Third. When the conductor of any car is required to stop at the intersection of a street to receive or leave passengers, the car shall be stopped so as to leave the rear platform slightly over the crossing.

Fourth. The conductor and driver of each car shall keep a vigilant watch for teams, vehicles and persons on foot (especially ladies and children) either on the track or moving towards it, and upon the first appearance of danger the car shall be stopped within the shortest time and space possible.

Fifth. The conductor shall not allow ladies and children to get upon the car or leave the car while in motion.

Sixth. The conductor shall announce to the passengers the names of the streets, the places where the car crosses any other street railroad track.

Seventh. The cars, after sunset, shall be provided with signal lights.

And in consideration of the said premises the party of the first part hereby agrees to give to the party of the second part all the right and authority that the said party of the first part has the right to grant, to construct, hold and operate, a street railroad with suitable turnouts to be hereafter located by said council; upon and along the following streets, provided the construction of the same be begun within thirty days and be completed within nine months
128 from and after the date of this contract. Said road to be built and operated upon the same terms and conditions expressed in this contract as to the other street railroads therein specified, except only as to the time within which said road upon the streets hereinafter specified shall be begun and completed, to-wit: Commencing at the intersection of Scott and Fourth Streets; thence west along Fourth Street to Bakewell Street; thence south on Bakewell Street to Riddle Street; thence west on Riddle Street to Philadelphia Street; thence south on Philadelphia Street to Lexington Pike.

In Testimony Whereof, the parties of the first part, by the President of its City Council, duly authorized thereto, and the said party of the second part by E. F. Abbott, S. B. Redgate and J. C. Blick for themselves, their associates, successors and assigns, have hereunto set their hands, at said city, this 23d day of December, 1869.

HOMER HUDSON, *President.*
E. F. ABBOTT.
SAML. J. REDGATE.

Said agreement was referred to Committee on Law with privilege of reporting this evening.

Mr. Casey, Chairman Committee on law, presented the following report on the contract between the City of Covington and E. F. Abbott, S. J. Redgate, and J. C. Blick, to construct, hold and operate street railroads on certain streets.

Contract correct and your committee recommend that the President be authorized to sign it in behalf of the city.

JAMES B. CASEY,
Chairman, Committee on Law.

Report concurred in.

129 *An Act to Incorporate the Covington & Cincinnati Street Railway Company.*

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

1. That Edward F. Abbott, S. J. Redgate, Samuel V. Reid and B. R. Morton, and their associates, be and are hereby created a body politic and corporate, with perpetual succession, under the name and style of "The Covington & Cincinnati Street Railway Company," and in such name to have full power to contract and be contracted with, sue and be sued, construct and manage railways in said City of Covington and vicinity.

2. The capital stock of the company shall be two hundred and fifty thousand dollars, divided into shares of fifty dollars each, to be paid for thus: one dollar per share on subscribing, and the residue on such calls as the directors shall prescribe; and if any call shall remain unpaid thirty days after due, the same may be collected by suit, or the company may forfeit the subscription, and all payments made thereon, for the benefit of the corporation, after thirty days' notice to that effect being published in some newspaper, or served upon the subscriber or his successor.

3. That the persons named in the first section of this act, or any three of them, are authorized to receive subscriptions to said capital stock, at such time and place or places as they shall deem expedient, and receive the advanced installment; and whenever not less than five hundred shares shall be subscribed, may hold an elec-
130 tion for five directors, and shall preside at the same, and give certificates to the persons elected directors. The election shall be by ballot, and stockholders may vote in person or by proxy, and shall be entitled to one vote for each share paid by him, and a plurality shall elect.

4. The directors shall organize by electing one of their body president, and any three shall constitute a quorum for business. The board may appoint such officers, agents and employes as may be deemed necessary or proper, and prescribe their duties and fix their compensation; may make and ordain all necessary by-laws and rules for the management of the affairs of the company and its business, in the discretion of the president and directors; determine the time and place for holding the annual elections; and from time to time may declare such dividends of the business of the company as the net profit shall justify.

5. The business of said corporation shall be the construction and operation of street railways in said city and vicinity along such streets and public highways in the city as the Council may grant

the right of way to, and along such roads out of the city as the companies owning the road may cede the right to use of so much of the road or grade; and said city and such companies are hereby authorized to grant the right of way, and agree to the necessary grade for the railway tracks; and when the right of way cannot be obtained by mutual agreement, then the company may proceed to condemn the same, as in case of turnpikes and plank
131 roads; when the track may be prepared for use, and cars run thereon, the company shall have the right to charge reasonable rates of fare for passengers, which shall be payable on entering the cars; and if any passenger shall fail or refuse the payment, such passenger may be excluded from the car, provided the company shall have the rate in print posted up in the car in plain view.

6. The company may purchase and hold such personal and real estate, routes and railway tracks, as may be deemed requisite for its use, and sell, exchange, and convey the same at pleasure; and may erect or purchase such buildings, car-houses, shops, stables, and offices for the use of the company as the wants and convenience of the business shall seem to demand.

7. Authority is hereby given to the company to connect with and use the track of any other railway company in said city and vicinity, on equitable terms; that is, to pay such company a fair compensation for the use of such track; and it may also borrow money on the credit of the company, and issue its bonds therefor, bearing interest, not exceeding ten (10) per cent per annum, and secure the payment of the same by a mortgage upon the property, rights and franchises, and income of the corporation. Provided, the bonds shall be payable after date at some particular place, and of not less denomination than one hundred dollars, and there shall be coupons attached thereto.

8. The president shall be the chief officer of the company, and shall perform such duties and possess such powers and receive such salary or compensation, as the board may from time to time
132 prescribe.

9. This act shall be in force from its passage.

Approved January 21, 1870.

An Act to Amend an Act Entitled "An Act to Incorporate the Covington Street Railway Company."

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the act to incorporate the Covington Street Railway Company, approved February 9, 1864, be amended as follows, viz: That all of section three of said act, from and including the work provided to the end, or word stock, of said section, be stricken out and annulled.

2. That said company shall have power to unite with any other

street railway company or suburban railway company within or out of the state, upon such terms and conditions as may be mutually agreed upon by said companies, respectively; such consolidation not to effect the jurisdiction of the courts of this Commonwealth. Provided, that should said street railway company unite with any street railway of Cincinnati under this act, the fare for a single passenger from any point on the line of said railway, within the City of Covington, to Fifth Street in Cincinnati, shall not exceed ten cents, and that twelve commutation tickets shall be sold for one dollar.

3. This act shall take effect from and after its passage.

Approved March 20, 1872.

133 Book "L", Page 13. December 28, 1874.

Mr. Gray from Committee on Law, reported the following ordinance which was, and the yeas and nays being called, passed, and is as follows, to-wit:

An Ordinance to Extend the Time to Begin and Complete Certain Street Railway.

Be it ordained by the Council of the City of Covington:

That the time for the commencement of the work of constructing the street railway lines, set forth in the contract dated December 23, 1869, between said city of the first part and E. F. Abbott and S. J. Redgate of the second part, be and the same is hereby extended to said Abbott and such associates as may become interested with him, for the time of six months, from the passage hereof, upon the terms, conditions and stipulations contained in said contract, as if the same were herein repeated.

The said Abbott and his associates incurring all the liabilities and responsibilities therein provided, and to enjoy all the rights and privileges therein granted.

Second. The route beginning at the corner of Fourth and Scott Streets and running west of Fourth Street, to be modified as follows, to-wit: To extend west on Fourth Street to Main Street, and south on Main Street to Pike, east on Pike and crossing Madison to Cooper, thence on Scott, and north on Scott to beginning.

134 Third. This ordinance to take effect from its passage, provided said Abbott shall file within ten days in the City Clerk's office his written acceptance of the provisions of this ordinance, containing the obligations of his part of said contract, and binding himself to complete said road within nine months from the passage of this ordinance, and if not so completed, the contract to be void.

Passed by the following vote: Yeas—Messrs. Deglow, Geisbauer, Gray, Glore, Holmes, Hall, Kearney, McDannold, Rose, Shinkle, Stuart and Whittle, 12; Nays—Mr. Mittendorf.

The committee on law and railroads accompanied the above ordi-

nance with the following report: "We the committee to whom was referred the within ordinance, recommend its adoption."

N. BARTLETT,
Chairman Committee on Law.
R. H. GRAY,
Chairman Committee on Law.
A. STUART.
H. R. DEGLOW.

Deed from Abbott and Associates to the Covington & Cincinnati Street Railway Company, May 1, 1875.

Whereas, By virtue of an act of the Kentucky Legislature entitled "An act to incorporate the Covington and Cincinnati Street Railway Co." approved January 21, 1870, Edward F. Abbott, S. J. Redgate and Samuel V. Reid and B. R. Morton, and their associates, were incorporated under the above corporate name and authorized to construct and manage railways in Covington and vicinity,
135 and said company have organized by the stockholders electing a board of directors.

And Whereas, the City Council of Covington, Ky., by a contract dated December 23, 1869, granted the right of way to said Abbott & Company to construct a street railway along certain streets in said city,

And Whereas, the time for exercising said privileges elapsed without any work being done, and said City Council passed an ordinance on the 28th day of December, 1874, entitled "An Ordinance to Extend the time to Begin and Complete Certain Street Railways", wherein all the rights granted by said contract of December 23, 1869, were granted to said Abbott and his associates and assigns, together with other privileges.

And Whereas, by another ordinance passed January 28, 1875, by said Council, authority was given to said Abbott, his associates and assigns, to connect the track of said railway from Fourth Street through Market Street and the alley north thereof with the tracks on the Suspension Bridge, and the said corporation having organized for the purpose of constructing said street railway lines are authorized by their charter and the said ordinances and obtained from said Abbott and associates all their rights and privileges under said charter and under said contract and said ordinance.

Now Therefore, For and in consideration of the sum of one dollar the said Edward F. Abbott, Samuel V. Reid and B. R. Morton hereby sell, assign, transfer and set over to said Covington and Cincinnati Street Railway Company all the rights, privileges,
136 franchises and interest which they or either of them have in and to said charter, contract, and ordinances, and all interest vested in them thereby, the said corporation assuming all the liabilities and obligations of said grantors and agreeing to save them harmless in the premises.

To have and to hold the said rights and privileges and franchise

to the only use benefit and behalf of said street railway company, its successors and assigns, free from the claims of the grantors herein.

In Witness Whereof, they have hereunto subscribed their names this 1st day of May, 1875.

(Signed) E. F. ABBOTT.
S. V. REID.
B. R. MORTON.

An Act to Incorporate the South Covington and Cincinnati Street Railway Company.

Be it enacted by the general assembly of the Commonwealth of Kentucky:

1. That E. F. Abbott, B. R. Morton, W. C. Ford, and S. C. Hermes, or those of them who shall act, their associates, successors and assigns, be and are hereby created a body corporate and politic, with perpetual succession, under the name and style of the South Covington & Cincinnati Street Railway Company, and in such name to have full power to contract and be contracted with, sue and be sued, construct, operate and manage street railways in the Ctty of Covington and vicinity.

2. Said Company shall have a capital stock not to exceed
137 two hundred thousand dollars, divided into shares of fifty dollars each.

3. The business of said corporation shall be the construction, operation and management of street railways in the City of Covington and vicinity, and along such streets and public highways in the city as the Council shall grant the right of way and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said cities and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way cannot be obtained by agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel and plank roads; and it may at, any time, by agreement or purchase, lease, consolidate with, acquire, hold or operate any other street railway or interest therein, in Covington, Cincinnati, Newport or vicinity and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof.

4. Authority is hereby given to the company to cross the tracks of any other company; also to connect with and use the tracks of any other railway company in the city of Covington and vicinity, on equitable terms; that is, to pay such company a fair compensation for the use of such track. In the event a mutual agreement cannot be effected with such other company for the use of
138 such part of its track as desired, then such use may be condemned by proceedings under a writ of ad quod damnum, as

provided in Chapter 110, entitled "Turnpike, Gravel and Plank Road" in the General Statutes.

5. The board of directors shall consist of not less than three nor more than five, as shall be determined from time to time by the by laws, that may be ordained by the board of directors; also which shall prescribe the time, manner and place of their election. Each share of stock shall entitle the holder to one vote, either by himself or by proxy, in writing, and the persons having the highest number of votes shall be declared elected.

6. The corporators in the first section mentioned, their associates, successors and assigns, shall organize said company, and shall constitute the first board of directors. The board shall elect one of its members president, and such other officers as may be deemed advisable, and may fill all vacancies occurring in the board; and may appoint such agents and employes as may be desired, and prescribe their duties and fix their compensation; and may make all necessary by-laws and rules for the management of the company; and may purchase and hold such real and personal estate, routes, railway tracks, bonds, notes or obligations as may be deemed requisite for its use, and sell, convey, and exchange the same at pleasure; and may dispose of stock from time to time, and reissue such as may be acquired in the course of its business, whether taken for liens, debts, or otherwise; they may borrow money on the credit
139 of the company, at a rate of not exceeding ten percent per annum, and may execute the notes or bonds of the company, and sell or dispose of the same, when deemed advisable, for the use and benefit of the company; and to secure the payment thereof, or of any indebtedness of the company may mortgage or pledge the whole or any part of the property, income and franchises of the company.

7. The company shall have the right to charge reasonable rates of fare for passengers, which shall be payable on entering the cars; and if any passenger shall fail or refuse the payment, such passenger may be excluded therefrom, provided the company shall have the rate in print posted up in the cars.

8. The president shall be the chief officer of the company, and shall perform such duties, and possess such power, and receive such salary or compensation, as the board may from time to time prescribe.

9. This act shall be in force from its passage. Approved January 25, 1876.

An Act to Amend The South Covington and Cincinnati Street Railway Charter.

Be it enacted by the General Assembly of the Commonwealth of Kentucky.

1. That the said company be and is hereby authorized and empowered to construct, extend and operate its line of railway along

Fourth Street, from Scott Street to the Newport and Cov-
140 ington Bridge over the Licking River, and to cross the same upon such terms as may be agreed upon by and between said bridge company and this street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as it may designate, and as may be agreed upon by and between said city and said company and to extend its lines to and across Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully empowered to make such contracts and agreements with this street railway company.

2. Said company may construct and operate any branch or branches to its main line which may be deemed advantageous, and may change lines, or consolidate them, or change location of branches, remove tracks to new locations, the right of way being first obtained therefor.

3. In the event of a failure to make an agreement with said bridge companies, or either, for the right of transit across the same with said railway of this company, or to affect an agreement with the proper authorities of either of said cities for the right of way, or with other railway companies for the right to cross, connect with or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, street or railway track by writ of ad quod damnum, as provided by Chapter 110 of the General Statutes, entitled "Turnpikes, Gravel and Plank Roads."

4. This act shall be in force and take effect upon and after its passage.

Approved March 13, 1878.

141 *An Act to Amend the Charter of the South Covington and Cincinnati Street Railway Company.*

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the said company be and is hereby authorized and empowered to construct, extend and operate its line of railway along Fourth Street, from Scott Street, in the City of Covington to the Newport and Covington bridge over the Licking River, and to cross the same on such terms as may be agreed upon by and between said bridge company and said street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as may be agreed upon by and between said city and said company; and to extend its lines to and across the Newport and Cincinnati bridge by agreement with said bridge company. The said cities and said bridge companies are fully authorized to make such contracts and arrangements with said street railway company.

2. Said company may construct and operate any branch or branches to its main line within the city of Newport which may be deemed advantageous, and may change such lines or consolidate

them or change the location of any of its branches, or remove its tracks to new locations, the right of way therefor having been first obtained from said city. Said city of Newport shall prescribe the terms and conditions upon which said railway company may operate and control said line, branches, change lines and consolidations constructed in said city of Newport, under the authority of this amendment.

142 3. In the event of a failure to make an agreement with said bridge companies, or either, for the right of way across the same with said railway company, or with any other railway companies, for the right to cross, connect with, or use the track, or portions thereof, of such company in either of said cities, then this company may proceed to condemn said right to said bridge or railway track by proceeding by writ of ad quod damnum, as provided in Chapter 110 of the General Statutes, entitled "Turnpike, Gravel and Plank Roads."

4. The cars used on said lines of railway shall not be operated or propelled by steampower. The tracks thereof shall conform to the grades of the streets on which they are respectively located, and during the construction or repair, or reconstruction of such streets shall be taken up, if necessary, and replaced at the cost of the said railway company; and said company shall have no claim for damages by reason thereof against said city of Newport, nor for any delay or hinderance thereby occasioned to the running of the cars of said railway company.

5. This act shall be in force from its passage.

Approved April 5, 1878.

Petition from Abbott for a Right of Way on Market Street Between Third and Fourth.

Book "L," Page 179. June 24, 1875.

143 Mr. Deglow presented a petition from E. F. Abbott asking that prompt action be taken with regard to the right of way on Market Street, between Third and Fourth Streets. Accompanying said petition was the following ordinance, which was read, and the yeas and nays being called, passed; and is as follows to-wit:

An Ordinance Granting the Right of Way to the Covington and Cincinnati Street Railway Company, for a Street Railway Track on Lower Market Space, Scott and Fourth Streets in Covington.

Be it Ordained by the City Council of Covington:

That the Covington & Cincinnati Street Railway Comapny be and are hereby authorized to connect their track on Market Street with that on Fourth Street, by running West on the North side of Market Space to Scott Street; thence south on Scott Street to Fourth; thence

east on Fourth to Market Street, and the right of way through said streets is hereby granted to said railway company for said purpose, for the period of five years. That said tracks be constructed in the same manner as the tracks which they connect are required to be constructed, and that they be held on the same conditions. Provided, however, that said company shall keep the streets in good repair between the rails (with like material as the streets) of said tracks and on the outside for a distance of twelve inches from the rails on both sides thereof, and where a track is already laid in any part of said way hereby granted, then one rail of the track now authorized shall be laid in the center of the existing track, and in the event of the removal of the old market house, now standing
144 on said space, the city reserves the right to require the removal of this track to the center or such other position in said Market space, as shall be deemed proper by Council, at the expense of said railway company, and that the city shall incur no liability whatever on account of said grant.

Book "L," Page 51. January 28, 1875.

An Ordinance to Authorize the Connection by Street Railway Between the Track on Fourth Street in Covington and the Cincinnati Bridge.

Be it Ordained by the City Council of Covington:

That E. F. Abbott, his associates and assigns, upon completion of the street railway, on the Fourth and Main Street route, granted by ordinance dated December 28, 1874, be and are hereby authorized to construct a line of street railway from Fourth Street north through Market Street, and the alley immediately north thereof, to and across Second Street, with necessary turnouts to make connection between the tracks crossing the Suspension Bridge and that traversing Fourth Street, the track to occupy the center of said street and alley, and to be constructed after the same manner as the tracks along other streets which said Abbott, associates and assigns are authorized to construct; provided, that in case of a change in the width or grade of said street or alley, the said Abbott, associates and assigns shall at his or their own expense make such change in the location
145 or grade of the track as the City Council may direct.

Deed from the Covington & Cincinnati Street Railway Company to the South Covington & Cincinnati Street Railway Company. December 20, 1876.

Whereas, All of the stockholders of this company have consented to and authorized the sale and transfer of all the property, rights, credits, effects, right of way, grants and privileges of the same to the South Covington & Cincinnati Street Railway Company, and ne-

gotiations therefor having been affected by said company, which the terms have been fully agreed upon.

Therefore, The Covington & Cincinnati Street Railway Company, a corporation under the laws of Kentucky, being empowered hereto, for and in consideration of the sum of five dollars in hand paid and of other valuable considerations, also of the undertaking and covenants of the said South Covington & Cincinnati Street Railway Company, hereinafter mentioned, does hereby grant, bargain, sell, convey and confirm to the said South Covington & Cincinnati Street Railway Company a corporation organized under an act of the Legislature of said commonwealth, approved January 25, 1876, all the estate, real, personal and mixed of the grantor located in Kenton
146 County, Kentucky, including rights of way, grants, railway tracks, tournouts, turntables, land lots, building, stables, offices, cars, horses, mules, harness, tools and all and every article and species of property, rights, and credits of or belonging to the said Covington & Cincinnati Street Railway Company or to which it has or is entitled to any interest or claim whatever, including all benefit of the contract with the Cincinnati Consolidated Street Railroad Company.

To have and to hold same and every part or parcel thereof, right thereto or interest therein, unto the only proper use and benefit of the said South Covington & Cincinnati Street Railway Company, its successors and assigns forever.

And the Covington & Cincinnati Street Railway Company covenants to and with the said South Covington & Cincinnati Street Railway Company, that it is the true and lawful owner and possessor of the said property and premises, rights and privileges, and has good right and full power to sell and convey the same in the manner and form herein expressed, and further that it will warrant and forever defend the title and right to said property and premises as free from and against the claims of all persons and parties whomsoever, except as to the existing mortgage bonds outstanding against the company and a balance of the purchase money owing upon a lot upon Scott and Sixteenth Streets. And the said South Covington & Cincinnati Street Railway Company does hereby covenant and agree to and with the Covington & Cincinnati Street Railway Company to observe, keep and fully perform all the obligations and undertakings of the
147 Covington & Cincinnati Street Railway Company to the city of Covington in reference to the right of way in the streets of said city; and the grantee herein also covenants to pay and discharge said mortgage bonds and said purchase money for the lot on the corner of Scott and Sixteenth Streets, and to pay all other legal claims against and liabilities of the grantor now existing; and to save said Covington and Cincinnati Street Railway Company harmless and fully indemnified in the premises.

In Witness Whereof, The said Covington & Cincinnati Street Railway Company and the South Covington & Cincinnati Street Railway Company, by order of their respective Boards of Directors, have hereunto subscribed their corporate names and affixed their corporate

seals by their respective presidents and attested by their several secretaries the date aforesaid.

THE COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
By E. F. ABBOTT, *President.*

Attest:
JAMES A. COLLINS, *Secretary.*

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
By W. O. FORD, *President.*

Attest:
GEORGE M. ABBOTT, *Secretary.*

148 *An Ordinance Authorizing the South Covington & Cincinnati Street Railway Company to Lay a Curve Around the Northeast Corner of Fourth & Scott Streets.*

Section 904. (Be it ordained by the City Council of Covington): That the South Covington & Cincinnati Street Railway Company be and the same is hereby authorized and empowered to lay a curve for its cars on the northeast corner of Fourth and Scott Streets, connecting its rails on Scott Streets, beginning with the north line of Fourth Street, to its rails on Fourth Street at a point not exceeding one hundred feet east of the east line of Scott Street.

Provided, that the rails of said curve shall be placed so as to conform to the grades of said street, as now established, or hereafter to be established, and whenever said grades are changed by the City Council of Covington, said curve shall be changed by said company so as to conform to said new grades; and provided, further, that in laying said curves said company shall offer no unnecessary obstruction to the general travel on said streets, and that the said company shall, without undue delay, after laying said curve, put said streets in good repair where the same has been torn up by said act, and shall, at its own expense, keep the portion of the street between the terminus of said curve from curb to curb in good repair and with the same material as the rest of said street.

Be it Further Ordained, That, as a part of this ordinance,
149 the city of Covington reserves the right, by giving three months' notice to said company, to have the street vacated for the uses named in this ordinance.

Passed and approved, June 19, 1879.

Letter from the Covington Street Railway Company With Reference to Court Avenue.

To the Honorable City Council of Covington, Kentucky.

GENTLEMEN: Whereas, it is desirable that Bridge Avenue when opened shall not be obstructed with street car tracks, and that some

provision should be made so that all cars now running between Covington and Cincinnati should enter the approach to the Suspension Bridge via Second and Greenup Streets, and leave via Second and Scott Streets the same as the Covington White Line and Newport line of cars now run.

The Covington Street Railway Company White Line propose with the consent of the City Council to allow the use of their tracks on Second, Scott, Fourth and Greenup Streets, to the South Covington & Cincinnati Green Line Company.

Provided the South Covington & Cincinnati Green Line Company, with the consent of the City Council, will allow the Covington Street Railway White Line Company the use of their tracks on Fourth Street from Scott to Main Street, so that the White Line can run a line of cars to the hill west of Covington, via Fourth Street, and returning on Third Street. Each Company to run its cars so as not to interfere with the running of the other, and pay its proportion of cost of track and maintenance used.

Respectfully,

T. C. ROBBINS,
Superintendent.

An Ordinance Granting to the South Covington & Cincinnati Street Railway Company the Right of Way Over Court Avenue, Etc.

Whereas, the South Covington & Cincinnati Street Railway Company has laid and is now using a single track railway in the alley running from Third Street north to the Covington and Cincinnati bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track, which it is believed will promote the convenience of the general public; therefore,

Be It Ordained by the General Council of the City of Covington:

That the South Covington & Cincinnati Street Railway Company be and the same is hereby authorized to lay a double track on said proposed avenue from Second Street to Market Space, so as to make connection with its track as now laid on Market Space and Market Street, and to use and enjoy the same, as well as its tracks on Fourth and Scott Streets, upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track by the provisions of a certain agreement entered into between E. F. Abbott, etc., and the City of Covington, on the 23d day of December, 1869.

Provided, further, that the said South Covington & Cincinnati Street Railway Company shall file with the City Clerk its written acceptance of this ordinance within ten days after its passage.

Passed and approved October 13, 1881.

Proceedings and Ordinance, June 8, 1882.

"A regular meeting of the City Council of Covington was held at the Council Chamber, Thursday evening, June 8th, 1882, President Prague in the chair and all members present.

Mr. Davezac, Chairman of the Committee on Rail Roads and Bridges, presented the following report on a communication from Jno. Williamson, President of the Covington St. Railway Co., in which he asks Council to pass an ordinance authorizing the South Covington & Cincinnati Street Railway Co. to contract with the Covington Street Railway Co. for a right of way over the sts. named in the grant, to the Covington Street R. R. Co., date August 15th, 1865.

To the Hon. President and Members of the City Council:

GENTS: Your Committee on Rail Roads and Bridges to whom the within communication was referred, would most respectfully report in favor of the passage of the accompanying ordinance, which provides for Court Avenue and Park Space to be free from St. Railroad tracks.

ALEX. DAVEZAC,
T. J. SMITH.

152 Report of Committee concurred in, and the accompanying ordinance, having been duly read, was passed, to-wit:

An Ordinance Granting the Right of Way Over Certain Streets in the City of Covington to the South Covington & Cincinnati Street Railway Company.

Section 906. (1) Be it Ordained by the City Council of Covington, That the South Covington & Cincinnati Street Railway Company be and the same is hereby authorized to contract with the Covington Street Railway Company for the right of way over and along the streets specified in the contract between the said Covington Street Railway Company and the City of Covington, dated August 15, 1865; and the consent of the latter company having been obtained, the said South Covington and Cincinnati Street Railway Company is hereby authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations and restrictions contained in the ordinances regulating its right to the streets now occupied by the said South Covington & Cincinnati Street Railway Company.

Provided, however, and the rights hereby granted are upon this condition, that the said South Covington & Cincinnati Street Railway Company shall, within thirty days after the passage of this ordinance, remove its track on Court Avenue and Park Place and relinquish all right and claim to the same; but in the event the city authorities shall hereafter authorize any other street railway company or companies to occupy and use said avenue or Park
153 Place for Street railway purposes, then the said South Covington & Cincinnati Street Railway Company shall have the same right to use said avenue and Park Place that it now possesses under existing ordinances, and,

Provided, also, that said Company shall have the right to make

such curves and connections as may be necessary to connect its tracks with the tracks on Greenup and Scott Streets.

Section 907 (2) This ordinance shall take effect from and after its passage, provided that the said South Covington & Cincinnati Street Railway Company shall, within ten days from the date hereof, file their written acceptance of same with the city Clerk.

Passed and approved June 8, 1882.

Master Commissioner's Deed on Foreclosure Sale of the Assets of the Covington Street Railway Company to the South Covington & Cincinnati Street Railway Company, March 20, 1883.

Whereas, the Kenton Chancery Court in the State of Kentucky, at its February Term, A. D. 1883, rendered a judgment in the action of Amos Shinkle, Trustee, etc., plaintiff, against the Covington Street Railway Company, etc., defendants, directing the sale of the property hereby conveyed, which sale was accordingly made to the South Covington & Cincinnati Street Railway Company for $55,000, on the 26th day of March, 1883, and was reported at the special March term, 1883, by the Commissioner of the Court, and the Court at its same term, 1883, by consent, confirmed that
154 report and directed the undersigned to convey to the grantee herein named the property hereinafter described.

Now, therefore, in consideration of these premises, Frank P. Helm, Master Commissioner of the Kenton Chancery Court hereby aliens and conveys unto the South Covington & Cincinnati Street Railway Company all the right, title and interest of Amos Shinkle, Trustee of the Covington Street Railway Company, a corporation under the laws of the State of Kentucky; Charles W. West; the Covington Street Railway Company, a corporation under the laws of the State of Kentucky; Charles H. Kellogg; Eramus Gest; J. A. Bishop; James E. English; the unknown owners of the first mortgage bonds issued by the said Covington Street Railway Company; A. S. Winslow, as trustee in the second mortgage or deed of trust made by the said Covington Street Railway Company; the unknown owners of the second mortgage bonds issued by said Covington Street Railway Company; Alexander G. Drury, Marshall P. Drury, W. A. Goodman, trustee of the South Covington & Cincinnati Street Railway Company; and T. E. Doolittle and J. E. Redfield, Receivers of the Townsend Savings Bank of New Haven, Connecticut; William Farron and H. L. Hotchkiss, in and to the following described property, to-wit: The right of way of the Covington Street Railway Company across the Covington & Cincinnati Bridge and on the bridge approach. Also the right of way for a period of twenty-five years from August 15, 1865, over the streets traversed now by said Covington Street Railway Company, and other streets specified in the contract between said Company and the City of Covington, dated August 15, 1865; also the tracks as now laid in the City of Covington
155 by said Covington Street Railway Company, to-wit: double track from their stable on Madison Street between Twelfth

and Thirteenth Streets to Third Street; thence east on Third Street by single track and turnouts to Greenup Street; thence north on Greenup Street to Second Street; thence west on Second Street to Scott Street; thence south on Scott Street to Third Street; also a double track on the approach to the Covington & Cincinnati Bridge; also about four hundred feet of track on the approach of said bridge on the Cincinnati side; also part of a track on Third Street between Madison and Main Streets; the rails of which have been taken up and used in repairing the track on Madison Street; also fifteen cars, sixty sets of single harness; tools for blacksmith shop, consisting of a pair of bellows, an anvil, a vise, tongs, heading tools, files, shoeing knives, etc., a one-horsepower hay cutter, track tools, consisting of picks, shovels, tamping bars, crowbars, mauls, sledges and drawbars; also a single track on Madison Street in said City of Covington, Kentucky, with turnouts and turntable, south of the stable to the terminus of the present track of the road between Fifteenth and Sixteenth Streets; also the following real estate, to-wit: Lot situated on the west side of Madison Street in Covington, Kenton County, Kentucky, beginning on the southwest corner of Madison Street and the first alley south and parallel with Twelfth Street; thence south with west line of Madison Street one hundred and twenty-eight feet to an alley ten feet wide; thence north with the east line of said alley one hundred feet to an alley sixteen feet wide; thence
156 east with the south line of said alley one hundred and twenty-eight feet to Madison Street and place of beginning, being parts of lots Nos. 371, 372 and 373, as laid out by the Western Baptist Theological Institute, also the rights, privileges and franchises of said Covington Street Railway Company under a charter authorizing the construction and operation of a street railway from the General Assembly of the Commonwealth of Kentucky, approved March 9, 1864, and an amendment thereto approved March 20, 1872, excepting only the franchise to be a corporation, to have and to hold said property with appurtenances unto the said grantee, and its successors and assigns forever. A lien is hereby reserved upon the property herein conveyed, to secure the payment of three sale bonds, executed by the grantee herein, with A. D. Bullock as surety, to Frank P. Helm, Master Commissioner, for eighteen thousand three hundred and thirty three and 33-100 Dollars each, due respectively in six, twelve and eighteen months after date, with interest from date until paid and dated March 26, 1883.

Witness the hand of the said Master Commissioner, this 30th day of March, 1883.

FRANK P. HELM, *M. C.*

Ordinance Granting Right to Double Track Madison Street to Southern Terminus, August 28, 1884.

Be it ordained by the City Council of Covington, Kentucky:

Sec. 1. That upon and subject to the terms, conditions, stipulations, limitations and restrictions in this ordinance contained,
157 the South Covington & Cincinnati Street Railway Company be and it is hereby authorized to extend its double track on

Madison Street, from the present terminus of the same on Madison Street, between Twelfth and Thirteenth Streets, southwardly to the southern terminus of the Madison Street route or corporation line, said double track to be located along the center of said street.

Sec. 2. The said South Covington & Cincinnati Street Railway Company shall have the right to hold, use and enjoy said double track so extended so far as the city has control over said portion of Madison Street south of Twelfth Street, upon and subject, however, to the same terms, conditions, limitations, restrictions, burdens, duties and liabilities as said street railway company now holds or uses the tracks on the same route north of Twelfth Street and subject also to the terms and provisions of this ordinance.

Sec. 3. The said double track railway on Madison Street south of Twelfth Street, and thence extending southwardly to the southern terminus of said Madison Street Route, shall conform to the grade of said Madison Street as now established or hereafter to be established, or to any change or grade that may hereafter be made, and when the City Council of said city shall change the grade of said portion of Madison Street south of Twelfth Street, as the same is now, or may hereafter be established, said street railway track shall be made to conform to the grade so changed at the expense of the said South Covington & Cincinnati Street Railway Company.

158 Sec. 4. The said South Covington & Cincinnati Street Railway Company shall, at its own expense, replace in as good condition as it was before, and under the direction and subject to the approval of the Committee on Internal Improvements of said council, the City Engineer and the Superintendent of Public Works of said city, any part of said Madison Street that may be removed in the construction of said double track street railway, and shall use due precaution to prevent the obstruction of public travel while said double track street railway is being built.

Sec. 5. Whenever said council shall ordain the improvement or the rebuilding or repair of Madison Street from Twelfth Street south to the southern terminus of said "Madison Street Route," or any part thereof, the said street railway company shall pay into the treasury of said city, immediately after said work shall have been completed and accepted by said council, such portion of the cost and expense of said improvement, rebuilding or repair, as according to the estimate of the City Civil Engineer of said city, shall bear the same ratio to the entire cost and expense of said work that the width of the space between the rails of said work may bear to the entire width of the streets from curb to curb, inclusive of the curbing.

Sec. 6. The said South Covington & Cincinnati Street Railway Company shall, at all times, at its own expense, keep in repair all of the crossings and intersections used by them on said portion of Madison Street, and also shall, at all times at its own expense, keep in good order and repair, with the same material and in the

159 same manner as the remainder of said street, to the satisfaction of the City Council, all the space between the rails of said double track, and also the street outside of each rail to the width of twelve inches therefrom.

Sec. 7. The right and privilege herein granted to the said South Covington & Cincinnati Street Railway Company are upon and subject to the conditions that the said street railway company shall, within thirty days after the passage of this ordinance, file in the Clerk's Office of the City of Covington, its written acceptance of the provisions of this Ordinance, and shall also, within six months after the passage of this ordinance, remove its present track and turnouts on Madison Street south of Powell Street.

Sec. 8. This ordinance shall take effect and be in force from and after its passage.

Acceptance by the South Covington & Cincinnati Street Railway Company of Ordinance of August 28, 1884.

COVINGTON, KENTUCKY, August 29, 1884.

The South Covington & Cincinnati Street Railway Company hereby accepts the ordinance passed by the City Council of Covington, Kentucky, August 28, 1884, granting to said Company the right to extend its double track on Madison Street from the present terminus of the same on Madison Street to the southern terminus of the Madison Street Route or corporation line.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.
By E. F. ABBOTT, *President.*

Received and spread on the Minutes September 4, 1884.

160 Book "I," Page 93. Passed and Approved July 7, 1887.

An Ordinance in Relation to the South Covington & Cincinnati Street Railway Company.

1. Be it ordained by the City Council of Covington that the South Covington & Cincinnati Street Railway Company be and the same is hereby authorized to construct a line of street railway over the following streets, to-wit: Commencing at and connecting with the present tracks on Powell and Greenup Streets and running eastwardly on Powell Street to Rickey Street; thence south on Rickey Street to Oliver Street; thence east on Oliver Street to Edward Street; thence south on Edward Street to Seventeenh Street; thence west on Seventeenth Street to Scott Street; thence north on Scott Street to Powell Street and connecting with the present tracks at the intersection of Powell and Scott Streets, and to hold and operate the said line upon the same terms and conditions upon which it holds and operates its present line of street railway, except in so far as said terms and conditions are changed by this ordinance.

The rights, privileges and franchises herein granted shall expire and terminate as the rights, privileges and franchises now exercised by said street railway company and under which said company is

now operated, and shall not be construed as extending in any way or for any length of time the rights, privileges and franchises heretofore granted to said street railway company, either as to any streets over which it now operates or may have the right to operate or as to the streets herein designated.

161 2. The line of street railway herein authorized to be built shall be completed and in operation, and the track of Madison Avenue extended from its present terminus to the corporation line within six (6) months after this ordinance takes effect, and hereafter the lines herein authorized to be built, as well as the extension to the corporation line on Madison Avenue, shall be regularly and continuously operated as herein provided for, and during such time as the said company's rights privileges and franchises in and to the streets of Covington or any of them may exist, otherwise the rights, privileges and franchises herein granted shall cease and determine and become null and void, and the City Council shall have the right to so declare by resolution.

3. All contracts with the city and all ordinances in conflict with this ordinance are hereby rescinded and repealed so far as the same are in conflict herewith.

4. Said company shall not be required to repair or pay for the repairs of streets, but in lieu thereof it shall pay into the City Treasury of Covington annually the sum of $2,600.00, payable in equal installments, two in number, between the first and fifteenth day of June and December of each year, provided that said company shall not be relieved from its obligation to repair and renew the streets of Covington as in the ordinance provided until the extensions herein named are made and in actual operation; and provided, further, that said company shall not hereafter be required to have or employ conductors on its cars.

162 5. Upon any failure of said street railway company to run its cars over the line of street railway extension herein authorized, or over the extension required to be made on Madison Avenue to the corporation line for one day, unless said company without fault on its part and unavoidably be prevented from so doing, then said track or tracks may be taken up and removed by the City of Covington at the cost and expense of said Railway Company, and all rights and privileges herein granted shall thereupon cease and become wholly void.

6. This ordinance shall take effect from the date of acceptance by the said South Covington & Cincinnati Street Railway Company, provided that said Company shall first file with the City Clerk its written acceptance of same within ten days after its passage, and also provided that the said company shall file with the said Clerk a bond in the sum of $15,000.00 with at least sureties, conditioned upon the faithful performance of the provisions of this ordinance, which bond shall be first approved by this Council. The approval of said bond by this Council to be made before the rights, privileges and franchises herein granted shall take effect, and to be a condition precedent to the exercise of any of the rights, privileges and franchises herein granted.

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7. Said company shall repair and replace all streets herein named and over which the right of way is herein granted to them in as good repair and condition as previous to laying their tracks thereon.

163 Book "S," page 539. July 16, 1887.

Acceptance by South Covington & Cincinnati Street Railway Company of Ordinance of July 7, 1887.

To the City Council:

GENTLEMEN: The South Covington & Cincinnati Street Railway Company accepts the ordinance of the City of Covington passed at the regular meeting of the City Council Thursday evening, July 7, 1887, entitled "An Ordinance in Relation to the South Covington & Cincinnati Street Railway Company."

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
By E. F. ABBOTT, *President.*

Attest:
J. C. BENTON.

July 16, 1887, received and filed and ordered spread upon the Minutes.

An Ordinance Authorizing the South Covington & Cincinnati Street Railway Company to Construct and Operate An Electric System of Street Railway On and Over Its Lines in the City of Covington.

Section 922 (1). Be it ordained by the City Council of the City of Covington that the South Covington & Cincinnati Street Railway Company be and the same is hereby authorized and empowered to construct, erect, establish, maintain and operate a system of electric street railway, with all the necessary plants, fixtures, appliances and appendages that may now be, or that may hereafter
164 become, necessary for the proper use and operation of the same on and over all the streets of the City of Covington, on and over which it is now operating its street railway line with horse and mule power, and on and over all other streets in the City of Covington, on and over which the said company now has the right or power to operate a street railway.

Section 923 (2). The cars of said electric system may be drawn at a greater rate of speed than six miles per hour, but not greater than ten miles per hour.

Section 924 (3). Said South Covington & Cincinnati Street Railway Company binds itself to pay any and all damages of every kind, whether to person or property, or both, which the city of Covington may suffer, or for which she may be held liable by reason of the rights and privileges herein granted; and for the faithful performance of the stipulation hereof, said company shall give bond to said

city, with good security, in the sum of $25,000.00 before this ordinance shall take effect; and if at any time the securities on said bond shall die or become insolvent, or insufficient, the city shall have the right to require additional security to make said bond good.

Section 925 (4). Said company shall operate said electric system on and over no other streets than those on and over which it is now operated or on and over which said company may now have the right to operate its present system.

Section 926 (5). This ordinance is not intended to, nor shall it give any other rights and privileges to, the South Covington
165 & Cincinnati Street Railway Company than as above set out, and said company shall be subject to the same terms, conditions, limitations, restrictions in all other respects, to which it is now subject; and further, as the length of time during which said South Covington & Cincinnati Street Railway Company is now authorized to operate its lines of railway over the streets of the city of Covington is a matter of disagreement between said railway company and said City of Covington, said city claiming that the time will soon expire, and said company claiming that the time is now limited, it is expressly understood that nothing in this ordinance shall be construed to, nor shall it give to, said railway any further or longer time than it now has to operate its lines, or any of them, under its present or any other system within the city of Covington.

Section 927 (6). Transfer checks shall be given for one fare or ticket from each and every line to each and every line within the corporate limits of the city of Covington, as said limits are now or hereafter may be extended, with this exception, however: that for a single fare or ticket no transfer check will be required from any of the lines, running north and south on Greenup, Scott and Madison to any of the lines running north and south on said streets, to-wit: Greenup, Scott and Madison. A passenger from Cincinnati shall be entitled to a transfer to any of the Covington lines without additional cost or charge therefor, as at present.

No greater rate of fare for a ride within the corporate
166 limits of the city of Covington shall be charged or asked, and no greater charge shall be made for tickets by said railway company, by whatever system it may be operated, than said company is now charging within the city of Covington, to-wit: five cents for a single cash fare and six (6) tickets for a quarter; twenty-five (25) tickets shall be sold for one dollar when obtained at the office of the company.

Section 928 (7). The City of Covington reserves the right to repeal or amend this ordinance with the rights and privileges herein granted, at any time before the said company shall bona fide enter upon the work of making the changes herein permitted, and the right to amend or repeal is also reserved if there be unreasonable and unnecessary delay in prosecuting the work of completion on and over any streets, on and over which the company now is operating, or has a right to operate, its line, extending from Front Street to the southern corporation line of the city, and along the line

known as the Main Street line beginning at Fourth and Scott Streets and ending at Fourth and Scott Streets.

Section 929 (8). If the provision of this ordinance be not accepted by said company in writing within thirty days from its passage no rights or privileges shall pass to said railroad company by reason of its passage.

Passed and approved August 5, 1889.

Proceedings Relative to the Sale of the Covington Street Railway Franchise.

Book "W," page 18. September 11, 1890.

167 Whereas, the franchise of the South Covington & Cincinnati Street Railway Company or that part of it known as the Covington & Cincinnati Street Railway Company (White Line) expired August 15, 1890, last month,

Therefore, be it resolved by the City Council of Covington that the matter of advertising the said Covington & Cincinnati Street Railway Company (White Line) franchise for sale be referred to special committee of three, in conjunction with Committee on Law and City Solicitor.

(Signed) T. W. SANDFORD.

Adopted, and Messrs. Snndford, Holtrup and Van Bokern appointed on said committee.

Book "W," page 43. September 18, 1890.

Mr. Sand-ord, Chairman of a special committee, presents the following report:

To the Council: Your Special Committee and Committee on Law, to whom was referred the resolution of T. W. Sandford with reference to the matter of advertising for sale the franchise of the Covington Street Railway Company, reported that they have examined into the rights of the Street Railway Company to the routes granted to the Covington Street Railway Company by the City of Covington, and are of the opinion that the period for which these routes were granted has expired; they therefore recommend that the

168 City of Covington, through some authorized committee or its City Clerk, offer for sale for a period of twenty-five years to the highest and best bidder and conformable to ordinance entitled "An Ordinance Prescribing the Terms and Conditions of Street Passenger Railroads within the City of Covington," passed December 13, 1864, and as amended August 3, 1865, by ordinance entitled "An Ordinance to Amend an Ordinance" approved December 13, 1864, entitled "An Ordinance Prescribing the Terms and Conditions of Street Passenger Railroads Within the City of Covington."

Greenup Street Route, or No. 1.

Commencing at the corner of Scott and Front, running south to Third; east on Third to Greenup; south on Greenup to Powell; east on Powell to Madison; returning over the same route to Third Street; continuing north on Greenup to Second; west on Second to Scott to same place of starting, to be a single track route with turnouts at following intersections of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

Madison Street Route, or No. 2.

Commencing at corner of Scott and Front, running south on Scott to Third; west on Third to Madison; south on Madison to corporation line; a double track on Madison from Eighth to Third, turnouts at the following intersections of streets with Madison: Robbins, Twelfth, Fourteenth and Fifteenth Streets.

Pike and Banklick Street Route, or No. 3.

Running over the Madison Street Route to Sixth Street; east on Sixth to Washington; south on Washington to Pike; west on Pike to Banklick; south on Banklick to Fifteenth; east on Fifteenth Street to Madison; a double track on Pike from Banklick to Washington; on Washington to Sixth Street; from Sixth to Madison, and turnouts at the following intersections of streets: Banklick, Eleventh, Thirteenth and Fifteenth Streets.

Main Street Route or No. 4.

Running over that portion of the Madison Street Route from corner of Front and Scott to Third and Madison; west on Third to Main; south on Main to Pike; west on Pike to York; a single track with turnouts at following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh & Main, Riddle and Main, Pike and Main, Pike and York and returning over the same route.

Third Street Route or No. 5.

Running over the Main Street Route to Main; west on Third to Bullock; south on Bullock to Second; returning over the same route; single tracks with turnouts at following intersections of streets with Third: Philadelphia and Bullock; together with the changes in the routes and additions that have been made to them since August 15, 1865.

Your Committee further recommends that the City Council, before the time fixed for said sale, select a person who shall act in conjunction with two others, one to be chosen by the owners of the railway property and the other to be chosen by the bidder of said property, whose duty it shall be to value all

the property of the owners of the railroads operating on the aforementioned routes.

T. W. SANDFORD,
H. VON BOKERN,
HENRY HOLTRUP,
Special Committee.
JOSEPH HERMES,
H. P. WHITAKER,
WM. BLICK,
Committee on Law.

Report concurred in and the following special committee appointed, viz: Messrs. Whitaker, Drige and Moser, who in connection with the City Solicitor, are to take charge of the matter of advertising, etc.

Upon motion of Mr. Whitaker the rules were suspended to permit him to present the following ordinances and to permit Hon. Harvey Myers to address this Council on behalf of said ordinances.

Granted and ordinances read and ordered published in the Daily Commonwealth, September 20, 1890, and a special meeting of the Council called for Tuesday evening, September 23, 1890 at 7:40 P. M. to consider the same.

Ordinance Offered By Mr. Whitaker:

An ordinance entitled "An Ordinance Granting the Cincinnati, Covington & Rosedale Street Railway Company the right to lay, construct, operate and maintain its line of railway tracks, poles, wires, etc., over and along and upon certain streets in the City of Covington, Ky."

171 Ordinance Offered By the Company:

An ordinance entitled "An ordinance granting the Cincinnati, Covington & Rosedale Street Railway Company the right to lay, construct, operate ad maintain its line of railway tracks, poles, wires, etc., over, along and upon certain streets in the city of Covington, Kentucky."

Mr. Scherrer offered the following in connection with the above: Four remonstrances numerously signed by citizens and property owners against the proposed street railway on Russell Avenue.

Action thereon deferred.

An Ordinance Granting the Cincinnati, Covington & Rosedale Street Railway Company the Right to Lay, Construct, Operate and Maintain its Line of Railway Track, Poles, Wires, etc., Over, Along and Upon Certain Streets in the City of Covington, Kentucky.

Section 766 (1). Be it Ordained by the City Council of the City of Covington, Ky.: That the right and power is hereby granted

to the Cincinnati, Covington & Rosedale Street Railway Company to lay, construct, erect, operate and maintain a double or single track line of street railway, together with the necessary poles, wires, apparatus and conduits for the purpose of conducting, transmitting and controlling electric current necessary to the propulsion and operation of cars of said railway over, along and upon the fol-
172 lowing streets and highways in the City of Covington, to-wit:

Starting from a point in Fourth Street where the east line of the Covington & Cincinnati Elevated Railway and Transfer & Bridge Company's bridge intersects the same; thence west on Fourth Street to Bakewell Street; thence south on Bakewell Street to Riddle Street; thence east on Riddle Street to the East line of Banklick Street, and from a point on Russell Street immediately opposite Riddle Street (provided they buy or condemn their way through the intervening space); thence south on Russell Street to the corporation line,

All damages accruing to the abutting property under this section to be borne by said street railway company.

Section 767 (2). The said track, poles, wires, conduits and everything pertaining to the conducting of said street railway shall be done and performed under the direction of the Mayor, Committee on Internal Improvements, of the City Council and City Engineer.

Section 768 (3). Said Cincinnati, Covington & Rosedale Street Railway Company shall conform to all the forms and requirements of a general ordinance of the city of Covington, passed December 15, 1864, and amendments thereto, except insofar as the same has been repealed, and that the franchise hereby granted shall endure for a period of fifty years from the date of the acceptance of this ordinance (or in which the same is repealed or amended by this ordinance).

And this ordinance giving the right herein granted shall be a contract under said ordinance of December 15, 1864.

173 Section 769 (4). Said company shall enter into a bond with good security in the sum of $50,000.00 to the city of Covington, to be approved by the Council of said city, conditioned that the said company will replace and repair said streets, and further that it will hold the city harmless against all and any costs or damages to person or property accruing to said city by reason of the construction and operation of the said railroad, and said company will keep the space between the tracks or rails, and for a space of at least twelve (12) inches on the outside of said rails, paved or keep in good order at the same grade of said street and with the same material as the said streets are improved with, during the period said company shall use and occupy said streets for the purposes granted by this ordinance.

The City Council reserves the right to compel said street railway company to give additional security or to renew said bond whenever said Council shall deem it necessary, and said bond, provided for by this section, shall be renewable every five years, and said bonds so renewed shall be subject to all the requirements of this section.

Section 770 (5). The speed of said cars of said company shall not exceed ten miles an hour.

Section 771 (6). The construction of the road shall be bona fide, begun with one year after the passage hereof, and it shall be completed to, and in actual daily operation within the southern corporation line of the city of Covington and Third Street in the City
174 of Cincinnati, Ohio, within eighteen months after the passage thereof, and upon failure of said company to begin and finish said construction as provided in this section, all rights and privileges granted under this ordinance shall be null and void and this ordinance of no effect.

Section 772 (7). Said company shall never charge, exact, demand or receive more than five cents cash fare for a single passage over its line of railway, from the southern terminus of said road to its northern terminus in the city of Cincinnati, Ohio, for carrying passengers any distance in the city of Covington, said company shall not charge to exceed five cents cash fare.

School children under twelve years of age, going to and coming from school, shall be carried for half fare.

Any violation of the provisions of this ordinance in this particular shall forfeit all of said company's rights to longer use and occupy any of the streets enumerated herein for street railway purposes.

Section 773 (8). Said street railway company shall not be permitted to lay any turnouts or tracks not contemplated by this ordinance without first obtaining the permission of the City Council of said city to do so.

Section 774 (9). Said company shall run and operate its line from the south corporation line of the city of Covington to Third Street in the city of Cincinnati, Ohio, without change of cars and at regular intervals, not to exceed ten minutes from 6 A. M. to 8 P. M., and at intervals of twenty minutes from 8 P. M. to midnight.

175 Section 775 (10). Poles for the suspension of electric wires and fixtures shall be of cedar or hard wood, iron steel or other smooth material, and shall be painted at least once a year, and kept in a clean condition.

The erection of said poles shall be under the supervision of the City Engineer, Superintendent of Public Works and Committee on Internal Improvements, and if said company shall place any of said poles on said streets or sidewalks that are not approved by said officials of said city, said company binds itself to at once remove said pole to such place as shall by said officers of said city be designated.

Section 776 (11). The right is reserved to the City Council of the City of Covington to at any time require the wires of said company to be placed underground, but no such electric wire shall be placed underground without the permission of, and in the manner prescribed by, said city Council by ordinance.

Section 777 (12). No motive power shall be used by said company between the southern terminus of its road in Covington, Kentucky, and Fountain Square on Fifth Street in Cincinnati, Ohio, except electric power, and each car shall carry both a conductor and a motorman, and one man shall not fill both places.

Section 778 (13). The rights and privileges herein granted shall not be transferred or assigned or sublet or shared by any other company, corporation or person without the consent of the City Council of the City of Covington, to be granted by ordinance.

176 Section 779 (14). The construction of the road herein authorized to be built shall be commenced within twelve months and shall be completed and in daily operation from the southern boundary line of the city of Covington, Kentucky, to the northern terminus of said road in Cincinnati, Ohio, and upon the failure of said company to comply with these conditions, all rights and privileges herein granted shall cease and determine.

Section 780 (15). Said company shall within ten days after the passage of this ordinance accept the same in writing, lodged with the City Clerk of the City of Covington, accompanying said acceptance with all bonds required by the provisions thereof, which shall be approved by Council before work is thus commenced on said road; and failure upon the part of said company to comply with the conditions of this section renders this ordinance null and void.

Section 781 (16). The City Council of Covington shall have the same authority to amend this ordinance that the General Assembly now has to amend charters and similar rights granted to it.

Approved October 20, 1890.

An Ordinance Granting the South Covington & Cincinnati Street Railway Company the Right to Lay and Maintain Tracks for the Purpose of Connecting Its Present Tracks on Madison Avenue

177 *with Car Depot at Northwest Corner of State Street and Madison Avenue.*

Section 930 (1). Be it Ordained by the Common Council of the City of Covington: That there is hereby granted to the South Covington & Cincinnati Street Railway Company the right to lay and maintrain tracks for street railway purposes on Madison Avenue, State and Mullins Streets, for the purpose of connecting its present system of street railway tracks on Madison Avenue with the car depot to be erected on the northwest corner of State Street and Madison Avenue, said connecting tracks to be laid and maintained according to the plan shown upon a plat filed herewith and made part of this ordinance.

Section 931 (2). Said company binds itself to pay all and any damages of every kind, either to person or property or both, which the city of Covington may suffer, or for which it may be held liable by reason of the rights and privileges herein granted.

Section 932 (3). This ordinance shall not give any other rights or privileges to the said company than as herein set out, and the said company shall be subject to the same terms, conditions, limitations and restrictions in all other respects to which it is now subject, and as the length of time during which said company is now authorized to operate over the streets of the city is a matter of disagreement between the city and the company, it is expressly understood that noth-

ing in this ordinance shall be construed to, nor shall it give to, said railway any further or longer time than it now has to operate its lines, or any of them, under its present or any other system within the city.

178 Section 933 (4). That the said South Covington & Cincinnati Street Railway Company shall keep the connecting tracks on Madison Avenue herein provided for in a good state of repair and with the same material that the contiguous portion of Madison Avenue is paved, or may hereafter be paved.

Section 934 (5). Any other street railway company operating its line on and over that portion of State and Mullins Streets on and over which the connecting tracks herein provided for are laid, shall have the right to use said tracks for the passage of their cars thereon upon paying to the South Covington & Cincinnati Street Railway Company its or their proportionate share of the cost of constructing and maintaining said tracks.

Approved January 3, 1891.

An Ordinance Amending an Ordinance Entitled "An Ordinance Granting to the Cincinnati, Covington & Rosedale Street Railway Company the right to lay, construct, operate and maintain its line of railway track, poles, wires, etc., over, along and upon certain streets of the City of Covington, Kentucky," being Ordinance No. 656.

Section 782 (1). Be it ordained by the common council of the city of Covington: That the ordinance mentioned in the caption hereof, being ordinance No. 656, be and the same is hereby amended in the first section thereof and in addition to said section as follows:

179 That the said Cincinnati, Covington & Rosedale Railway Company may lay its tracks, erect poles, etc., as provided in said ordinance on the following named streets: Beginning at the intersection of Russell and Eleventh Streets to Stevens Street, or Garrard Avenue, on Eleventh Street; thence south on Garrard Avenue on Twelfth Street; thence east on Twelfth Street to Rickey Street; also beginning at the intersection of Garrard avenue and Twelfth Street; thence south on Garrard Avenue to the corporation line.

Section 783 (2). That section 3 of said ordinance be amended to read as follows: Said Cincinnati, Covington & Rosedale Railway Company shall conform to all the forms and requirements of a general ordinance of the city of Covington passed December 15, 1864, and amendments thereto, excepting so far as the same has been repealed, and that the franchise hereby granted shall endure for a period of fifty years from the date of the approval of this ordinance, and this ordinance giving the rights herein granted shall be a contract under said ordinance of December 15, 1864.

But no part of Section 2 of an ordinance, which is *an* amendatory of the general ordinance prescribing the terms and conditions of

street passenger railroads within the city of Covington, passed December 15, 1864, which amended ordinance was passed August 3, 1865, and is entitled "An ordinance to amend an ordinance approved December 15, 1864, entitled 'An ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington,'" shall apply to this company. But at the
180 expiration of the period of fifty years the Council shall again offer the same routes, or those routes with other bonds added to any or all of them, to the highest and best bidder, provided the Common Council shall have the right to reject all of the bids, and offer the routes again.

Section 784 (3). That the portion of Section 7 of said ordinance No. 656, which reads as follows: "And any violation of the provisions of this ordinance, in this particular shall forfeit all of said company's rights to longer use and occupy any of the streets enumerated herein for street railway purposes," shall be amended to read as follows, to-wit:

That any violation of the provisions of this ordinance, in this or in other particular, shall forfeit all of said company's rights to longer use and occupy any of the streets enumerated herein for street railway purposes.

Section 785 (4). Said Cincinnati, Covington & Rosedale Railway Company shall pay the same license per car per annum as is now paid by the South Covington & Cincinnati Street Railway Company to the City of Covington.

Section 786 (5). Any portion of the track or tracks which have been laid, if said road is not fully constructed — in daily operation within eighteen months from the passage of this ordinance, shall be taken up by said company, and said streets put back in as good condition as the rest of the street is at the time, and with the same material, and if not taken up within thirty days and removed, said track shall be the property of the City of Covington, and also that portion of said route not in daily operation.

181 Section 787 (6). Upon the consent of the City of Covington being first obtained, the Cincinnati, Covington & Rosedale Railway Company shall grant the use of the track and its route to any other company or corporation, which allows to said Cincinnati, Covington & Rosedale Railway Company the use of the same distance of track on its route, selected by said Cincinnati, Covington & Rosedale Railway Company.

Section 788 (7). That whenever the name "The Cincinnati, Covington & Rosedale Street Railway Company" appears in said ordinance it shall be changed to read "The Cincinnati, Covington and Rosedale Railway Company." This ordinance shal lbe accepted as provided in the original ordinance, of which this is amendatory.

Section 789 (8). This ordinance shall have no force and not take effect until the Cincinnati, Covington & Rosedale Railway Company shall have first filed with the City Clerk of said city the written acceptance of Covington & Cincinnati Elevated Railway and

Transfer & Bridge Company, authorizing said railway company to construct its line over and to cross said bridge with its cars.

Approved May 18, 1891. No. 742.

An Ordinance in Relation to the South Covington & Cincinnati Street Railway Company.

Section 935 (1). Be it Ordained by the Common Council of the City of Covington: That, in consideration of the South Covington & Cincinnati Street Railway Company, within twenty days
182 after the acceptance of this ordinance, reducing and maintaining during the term of the contract period herein provided for a reduced cash fare of five cents, and no more for one continuous ride upon its cars from any point on its lines in the City of Covington, as the said corporation limits now are or may hereafter be extended, to Fourth Street or to Fountain Square in the City of Cincinnati to any point upon its lines in the city of Covington, as its corporate limits now are or may hereafter be extended; It being understood that the said company shall carry passengers to Fountain Square in the city of Cincinnati only in case it shall continue to operate its lines to said Fountain Square; otherwise to Fourth Street in Cincinnati; the transferring from one car or line to another car or line shall be held to be a continuous ride, and said company shall transfer in accordance with the provisions of an ordinance of August 5, 1889, that is: All lines running north and south shall transfer to those lines running east and west; and all lines running east and west shall transfer to those lines running north and south and in consideration of the said company, within six months from the passage of this ordinance removing its tracks from Scott Street south of Fourth Street to the Southern terminus of said track and street to the satisfaction of the Common Council, and double tracking Greenup from Second to Powell Streets; thence with a single track along what is known as the Austinburg extension around to Seventeenth and Greenup; also a double track from Powell and Greenup south on Greenup to Seventeenth Street, except where
183 the street is less than thirty five feet in width in Patton's Subdivision, which distance shall have a single track; thence south from Seventeenth and Greenup with a double track, along Greenup to State; thence with a double track west on State Street to Madison Avenue, and shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances, and put back all streets where tracks are removed or laid in as good condition and with the same materials as the rest of the streets, and to the satisfaction of the Common Council and according to the direction of the City Engineer.

The double tracks on Greenup Street and State Street are to be placed as near the center of said streets as it is consistent with public safety and convenience, and in consideration of said company, within ten months from the acceptance of this ordinance, removing its

tracks from Powell Street between Madison Avenue and Greenup Street, from Seventeenth Street, from Greenup to Scott, and from Banklick from Pike to Fifteenth Street and from Fifteenth Street from Banklick to Russell, replacing said streets in as good condition and with the same material as the rest of said streets, and to the satisfaction of the Common Council; and in further consideration of the said company removing its tracks from Cooper Street, between Madison Avenue and Scott Street, and replacing said street in as good condition as the rest of the street, and with the same material, to the satisfaction of the Common Council and according to the direction of the City Engineer; and in further consideration of the
184 said street railway company releasing the said city of Covington from all claims for loss, expense or damages by reason of the reconstruction of its tracks on the streets now being made with asphalt, the city of Covington does hereby agree, for a period of twenty years from and after the date of the acceptance of this ordinance by said street railway company, that it will not offer for sale, or sell, or attempt to sell, any of the rights, franchises, rights of way or privileges now held, used or enjoyed by said street railway company in the city of Covington, and to that end the resolution passed by the City Council of the City of Covington on the eleventh and eighteenth days of September, 1890, directing the sale of certain rights, is hereby withdrawn, and the suit now pending in the Circuit Court of the United States for the Sixth judicial District of Kentucky, at Covington, to wit: The South Covington & Cincinnati Street Railway Company, complainant, vs. The City of Covington, defendant, and the suit of W. A. Goodman, trustee, vs. The City of Covington, defendant, in the same court pending, shall be prosecuted to a final determination and judgment, or judgments, which shall fix and determine the rights of the litigants, provided, however, that if the courts in which the said suits are pending should, after the passage and acceptance of this ordinance, refuse to hear or try the issue of said cause or causes, or should dismiss the said causes without deciding the question at issue therein, or trying said causes, should decide the issue in favor of the city, then and in either of the said events, the city hereby agrees to postpone the enforcement of any of its
185 claimed rights to sell any of the franchises of the said company for a period of twenty years from and after the acceptance of this ordinance; and during said period of twenty years it will not attempt to sell or offer for sale any of said franchises; and should said court decide against the city, or any court to which the question may come decide adversely to the city, then said company will not take or use any advantage of said decision until the expiration of the term of twenty years herein granted said company. It is distinctly understood and agreed by said city and said company that this ordinance shall be held and construed to be only a compromise postponement of the assertion by the city of rights claimed by it, which rights are denied by said company, and are now the subject of litigation between the said city and the said company; but it is distinctly understood and agreed by both the said city and the said company that said city and said company will, if the court in which said suits are

pending, should hold that it has jurisdiction to hear and determine said suits, unite in asking said court to hear and determine said questions, notwithstanding the passage and acceptance of this ordinance, it being the purpose to have all questions between said city and said company determined in the court in which said suits are now pending, if said court decides that it has jurisdiction to hear and determine same, in order that both parties thereto may know their respective rights at the end of said period of twenty years. It is further distinctly understood and agreed by both the City of Covington and the said street railway company that neither the said city nor said company, by the passage and acceptance of this
186 ordinance, in any way admits, waives, relinquishes, prejudices or affects their respective rights and claims as they respectively existed before the passage of this ordinance, so far as they relate to the matters involved in the said suits. The agreement between the said street railway company and the said City of Covington, as above provided, is made upon the following terms and conditions, and all of them, viz:

That the said South Covington & Cincinnati Street Railway Company shall, within twenty days after the acceptance of this ordinance, reduce the rate of fare for carrying passengers from any point on its line within the limits of the city of Covington as the said corporate limits now are or hereafter may be extended, to any point on its line in the city of Cincinnati, as hereinbefore provided; or from any point on its line within the corporate limits of the said city of Cincinnati as hereinbefore provided; or from any point on its line within the corporate limits of the said city of Cincinnati, as hereinbefore provided, to any point on its line within the corporate limits of said city of Covington, as the corporate limits now are or may hereafter be extended, to a five cent cash fare, and no more, for each passenger, and to maintain the said reduced rates of fare during the compromise period herein agreed upon, to-wit: Twenty years from and after the acceptance of this ordinance, and in consideration of the said reduced rates of fare between the said cities of Covington and Cincinnati, the said street railway Company may charge and collect a five cent cash fare and no more, for passengers riding on its lines within the present or future corporation limits of the city of Covington.

187 It is the agreement by said company with the city of Covington that the five-cent fare shall apply to and extend over each and every line of street railway in the city of Covington, on and over which the cars of said company may run or be operated during the term herein granted, not only within the corporate limits of the city, but to and from Cincinnati.

The cars on Greenup Street and Madison Avenue shall be operated as a belt line over State Street, so that the cars shall pass both ways on said streets.

The said South Covington & Cincinnati Street Railway Company shall also run its cars out on Lexington Pike at least five hundred feet south of the intersection of Pike and Twelfth Streets within sixty days after the city gets possession of said pike, and the right is hereby

given to said company to so extend its line when the city has obtained control over said road.

The said street railway company shall, within six months after the passage of this ordinance, remove its track from Scott Street south of Fourth Street, and from Cooper Street, between Madison Avenue and Scott Street, and shall connect its track on Pike Street with the track of the said railway as now laid on Madison Avenue and Pike Street, so that the cars of said Company may pass to and from the tracks on Pike Street and Madison Avenue, and shall double track Greenup Street, as above provided, and extend its single track along what is known as the Austinburg extension around to Seventeenth and Greenup; also a double track from Powell and Greenup south
188 on Greenup to Seventeenth, except where the street is less than thirty-five feet in width, in Patton's subdivision, which distance shall have a single track; thence south from Seventeenth and Greenup with a double track along Greenup to State; thence south, with a double track west on State to Madison Avenue; and said company shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances within six months from the acceptance hereof, and shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6 A. M. to 5 P. M. and not to exceed five minutes from 5 P. M. to 8 P. M. and not to exceed ten minutes from 8 P. M. to midnight, and on all other lines, cars to be operated not to exceed ten minutes apart; and said street railway company shall have the right to lay and maintain tracks so as to connect its present system of tracks at the corner of Madison Avenue and Fourth Street with the railway track to be constructed on and over the proposed new bridge over the Ohio river, the Covington end of said proposed new bridge being at Fourth Street and Madison Avenue, in the city of Covington, Ky.

6. The said street railway company shall, at its own expense, lay such foundation under its tracks, over which cars are operated by electricity as aforesaid, as have been recently under and along Madison Avenue, from Fourth Street to State Street, and the work shall be done to the entire satisfaction of the Common Council, and the said company shall put back any street from which its tracks are removed, or on which its tracks may be laid, in as good condition as
189 the rest of the street. The city reserves the right to change the grade of the streets over which said railway routes are located, both as to curve and crown of the same, and the said railway company shall defray the expense, at any time the Council may direct of lowering or elevating such tracks as to conform to the said change of grade, and place a foundation such as is hereinbefore provided for; and, further, that said street railway company shall operate all of its lines by electricity as a motive power, using no horses or mules, and all poles to be hereafter erected by said company shall be of iron or steel, both along the new routes, and also along the old when new poles are needed, and so placed as not to interfere with or obstruct driveways. And the City of Covington expressly reserves the right and power to require all the wires of

said company used overhead to be placed underground at the expense of the company whenever deemed proper or expedient, and the South Covington & Cincinnati Street Railway Company also can, upon thirty days' notice in writing to the mayor of said city, put the wires underground whenever it so determines, unless sooner ordered by the City of Covington; and the said street railway company binds itself to replace all streets where the wires are put underground at its own expense, and to the satisfaction of the Common Council. That from and after the period of five years from the acceptance of this ordinance by the street railway company, said company shall contract for and adopt the best mode and manner of rapid transit, and the best way and manner then obtainable between the cities of Covington and Cincinnati and through the city of Covington; it being understood that the said company shall then
190 use the bridge or bridges between said cities which shall at the time afford the best facilities for rapid transit between Covington and Cincinnati; and if after the expiration of the period of five years there is no better mode of rapid transit between the cities of Covington and Cincinnati across the Ohio river, the said company or its successors or assigns shall, as soon thereafter as a more rapid mode can be obtained, adopt and use said mode. And whatever tracks along its routes in the city of Covington are not in operation, as herein provided, after a period of ten months after the passage of this ordinance, shall be removed at the expense of the street railway company and the streets put back immediately, where said tracks have been removed, in as good condition as the rest of the street, and with the same material; and whatever portion of the routes that are not, after a period of ten months from the acceptance of this ordinance, equipped and operated in the said city of Covington with electricity, shall be forfeited to the said City of Covington.

7. That the said street railway company shall release the city of Covington from any and all claims for damages, loss or expense incurred by it for or on account of the said street railway company in removing or relaying its tracks on the streets in the City of Covington, now being or hereafter to be made with asphalt, under the provisions of a resolution passed by the Common Council of the said city on the fifteenth day of October, 1891, requiring said improvements to
be made by said street railway company; and the said street
191 railway company shall continue to remove and relay its tracks and place the foundation as required, at its own expense, under and over the streets now ordered to be improved with asphalt, until the said work is completed.

Section 933 (2). In consideration of the said railway company removing its tracks from Scott Street, Powell Street, Seventeenth Street, Cooper Street, Banklick Street and Fifteenth Street, and double tracking Greenup Street and State Street, as hereinbefore provided, the said City of Covington agrees and covenants with the said South Covington & Cincinnati Street Railway Company, its successors and assigns, that it will not grant to any other company or companies, corporation or corporations, association or associations, individual or individuals, any right, privilege or franchise to lay,

maintain or operate its street railroad or street railroad track, or any other system of passenger traffic, on or over the streets so abandoned without giving to the said street railway company the same rights and privileges that are enjoyed by any other company, corporation, association or individual on the said streets or any of them; the term of the joint use to be settled by arbitration, each party to select one and those two a third party, who shall decide all differences. The City of Covington expressly reserves the right to exact a bonus or consideration from this company, as well as all others, for the use of such streets as are now abandoned by this ordinance, as well as for the use of all other streets that may be hereafter granted. The city reserves the right to permit any companies to cross the tracks
192 of the said South Covington & Cincinnati Street Railway Company wherever located.

Section 937 (3). The said street railway company shall, upon notification from the Mayor of Covington, that the city is prepared to proceed with the improvement of State Street between Madison Avenue and Greenup Street, and Greenup Street between Seventeenth and State Streets, proceed immediately after notification to lay the foundation under the tracks, and lay its tracks on State Street, between Madison Avenue and Greenup Street, and Greenup, between Seventeenth and State.

Section 938 (4). The terms and conditions of this ordinance shall be accepted in writing by the said South Covington & Cincinnati Street Railway Company within twenty days after the passage of this ordinance, and the said acceptance in writing shall constitute this ordinance a contract between the said street railway company and the city of Covington for the purpose herein provided.

Section 939 (5). If at any time the South Covington & Cincinnati Street Railway Company fails or refuses to comply with the terms and provisions, of any part thereof, of this ordinance, the Common Council can, upon twenty days' notice being given of such breach, order the tracks of the said company to be removed from the said streets which are named herein for its new tracks, and upon failure of said company to remove the same, the city can remove them at the cost of said company, and the said city of Covington reserves the right to repeal this ordinance for any breach of
193 the same after twenty days' notice to the said company. It is understood and agreed that the rights obtained under this contract, and ordinance cannot be assigned or sublet without the consent first being obtained from the Common Council of the said city of Covington.

Section 940 (6). The right to tear up the tracks, or have the same done, for the purpose of improving or repairing sewers, or laying gas or water pipes, or repairing the same, or making house connections with the same, or making any improvements or doing any work which necessitates the tearing up of tracks, or displacement of wires, or removing of poles, is reserved to said city, and may be exercised by it after a reasonable notice to said company, and the said company shall, at its own cost, replace said tracks, wires, poles, etc.

Section 941 (7). The said street railway company shall, before

this ordinance takes effect, and before said company acquires any rights under this ordinance, file with the City Clerk a bond, to be approved by the Common Council, with resident state sureties, in the sum of $25,000.00, that it will save the city harmless from any and all loss or damage or cost to persons or property by reason of the construction and operation of said railway, and also conditioned for the faithful performance and carrying out of all the provisions of this ordinance; and the Common Council can at any time require new or additional securities upon said bond, and the said bond shall at all times be subject to the approval of the Common Council, and the remedies secured to this city by this bond are additional to the other remedies in this ordinance to the city.

194 Section 942 (8). The said company shall dedicate to the city and open for public use for street purposes the South half of Sixteenth Street between Scott and Madison Avenue.

Section 943 (9). The said company shall pay to the said City of Covington each year during the first five years of the period of this contract the sum of $2,600.00, and each year during the second five years of the period of this contract the sum of $4,000.00, and each year during the third five years of the period of this contract the sum of $5,000.00, and each year during the fourth five years of the period of this contract the sum of $6,000.00, which yearly payments shall be in lieu of any and all car licenses or bonus. These sums shall be paid one half on the fifteenth day of June and one half on the fifteenth day of December, in each year. The said railway company shall, within ten months after the acceptance of this ordinance, electrically equip and operate what is known as the Third Street Route, beginning at Third Street and Madison Street, and extending west on Third Street to Bullock Street, and north on Bullock Street to Second Street; and the company shall extend its said line west on Second Street, from Bullock to the west corporation line of said city, and to lay proper turnouts on said line as it is now constructed or may be extended, so as to permit and facilitate the running of cars in opposite direction on said line. And permission is given to said company to connect its tracks at Fourth and Main streets with the tracks to be laid on the bridge of the Covington & Cincinnati Elevated Railway and Transfer and Bridge Company.

195 Section 944 (10). In full settlement and satisfaction of all claims of the City of Covington against said company on account of unpaid car licenses and bonus arising prior to the year 1893, the said company shall pay the City of Covington the sum of $1,500.00 immediately after the acceptance of this ordinance.

Section 945 (11). All cars operated on the Greenup, Madison and State Street line, running over the river, shall be operated as follows:

One half of the cars on leaving the suspension bridge shall proceed south on Madison Avenue, east on State Street and north on Greenup over the river; the other half of the cars shall on leaving the bridge proceed south on Greenup to State, west on State to Madison, and north on Madison on over the river.

Section 946 (12). Before a double track is laid on State Street from

Greenup to Madison, as hereinbefore provided, State Street shall be widened between said points at the expense of the company, to a width of not less than forty feet within the curbing, with an eleven-foot sidewalk on each side of said streets; provided, however, if the land necessarily required to widen said street cannot be purchased at just or reasonable prices, then said company must, within sixty days after the passage of this ordinance, produce to the Common Council of the City of Covington satisfactory evidence that it cannot purchase sufficient ground at reasonable or just prices from the owners of the same; then the city will proceed to condemn said land to widen said street; and when said land is condemned, the car
196 company shall pay all costs and damage of acquiring said land by said condemnation proceedings; the street car company to have the right to lay, maintain and operate a single track on State Street, between Greenup and Madison Street, until State Street is widened as to permit the laying of a double track on said street.

Section 947 (13). Said company, instead of operating its Austinburg line as it is now operated, shall extend its track out Edward Street to the corporation line; thence west along the corporation line to Garrard Street; thence north on Garrard Street to State Street; thence west on State to Greenup Sreet; provided, however, that the construction and operation of this line by said company shall operate as a surrender to the City of Seventeenth Street, from Edward to Greenup; and provided, further that every alternate car which passes over said line shall pass down and over Madison Avenue; and failure to comply with this provision shall also be taken as a breach of this ordinance.

Section 948 (14). In case the right of franchise has not been settled by the courts at the end of the term of this ordinance, then said street car company shall continue to pay *simi*-annually, as above provided, the sum of $7,500.00 per year until said suits are finally determined; and further that the said company binds itself that the reduced rates of fare mentioned in this ordinance shall continue until said suits are settled.

Approved October 7, 1892.

197 Vol. 3, page 214, et seq. October 18, 1892.

To the Honorable the Common Council of the City of Covington.

GENTLEMEN: The South Covington & Cincinnati Street Railway Company begs leave to respectfully notify your honorable bodies that it does hereby accept the ordinance passed by your honorable bodies, entitled "An ordinance in relation to the South Covington & Cincinnati Street Railway Company," approved October 7, 1892, and it files herewith a certified copy of a resolution passed this day by its board of directors, accepting said ordinance.

The company also hands you herewith a bond executed by it according to the provisions of said ordinance, said bond being to the City of Covington, for the sum of $25,000.00, with Samuel Bigstaff, John A. Williamson and C. B. Simrall, sureties.

The company also hands you herewith check on the Covington City National Bank for fifteen hundred dollars, in full payment according to the provisions of said ordinance of all claims of the City of Covington against this company on account of car licenses or bonuses prior to the year 1892.

The company also begs leave to advise your honorable bodies that it is prepared and ready at any time to have conveyed to the city of Covington, for street purposes, the south half of 16th Street, between Madison and Scott Street.

The company further begs leave to advise your honorable bodies and through you, the citizens of Covington, that it has fixed
198 the first day of November, A. D. 1892, as the day upon which the five-cent rate of fare will go into operation between the city of Cincinnati and the city of Covington, as provided in said ordinance.

The company had in view and hoped to had fixed an earlier day for the five-cent fare to go into operation, but the limited facilities that the company at present has for accommodating the large increase in travel which is expected to follow the introduction of a five cent cash fare renders it impracticable to encourage such increased travel before the new equipment purchased for the company arrives. This new equipment is contracted to be finished by November 1st, and for this reason this day has been fixed as the day upon which the change of fare will go into operation.

The company desires to urge upon your honorable bodies the passage, as soon as possible of the Rosedale ordinance, which was agreed should be passed simultaneously with the South Covington & Cincinnati Street Railway Company ordinance, and upon the faith of which passage this ordinance is now accepted.

With the Rosedale route completed a ground belt system of double track railway will be in operation with cars running in both directions to and from Newport, Cincinnati and Covington and into the territory beyond that town, all of which will be brought into close and immediate connection with the city of Covington, with rapid transit and cheap fares. Without the Rosedale route, the system of street railway proposed for Covington will be very incomplete. With that route is promised the most complete system of electric
199 street railway to be found in any city in the country. The company urges your honorable bodies to pass, as soon as possible, the ordinance extending the time for the completion of the Rosedale system.

In conclusion, the South Covington & Cincinnati Street Railway Company begs to assure your honorable bodies and through you, the citizens of Covington, that it will do all in its power to assist and promote the rapid and permanent development of the city. The company is fully impressed, that from this time forward, the interest of the city and the street railway are identical, and it pledges itself to promote and further the interests of the city and in this way to promote the interest of the company. It will necessarily be some time before the contemplated improvements in the system can be fully carried into execution, and in the meantime there must be un-

avoidable annoyance and delays to the traveling public. These will be removed as rapidly as possible. In the meantime the company asks the public to bear these necessary inconveniences with as much patience as it can.

Very respectfully,

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
GEO. H. KIMBALL, *Manager.*

An Ordinance to Extend the Time for the Construction of the Cincinnati, Covington & Rosedale Railway.

Section 797 (1). Be it Ordained by the Common Council
200 of the City of Covington: That the time for the construction and completion of the Cincinnati, Covington & Rosedale Railway within the city of Covington is hereby extended and continued for a period of twelve (12) months from and after the acceptance of this ordinance.

Section 798 (2). The extension of the time for the completion of said railway, as provided in the foregoing section, is given subject to the terms, conditions and requirements (except as to date of completion of said railway) contained in an ordinance approved the seventeenth day of November, 1892, entitled "An ordinance amending an ordinance, entitled 'An ordinance granting the Cincinnati, Covington & Rosedale Railway Company the right to lay, construct, operate and maintain its line of railway tracks, poles, wires, etc., over and along certain streets in the City of Covington,'" passed August 20, 1890, and amended ordinance No. 742, entitled "An ordinance amending an ordinance, entitled 'An ordinance granting the Cincinnati, Covington & Rosedale Railway Company the right to lay, construct, maintain and operate its line of railway tracks, poles, wires, etc., over and along certain streets in the City of Covington,'" approved May 18, 1891.

Section 799 (3). The terms and conditions of this ordinance shall be accepted in writing by the Cincinnati, Covington & Rosedale Railway Company within twenty (20) days after the approval of this ordinance by the mayor, and said acceptance in writing shall constitute this ordinance a contract between said railway company and the City of Covington for the purpose hereinbefore provided.

Approved Sept. 27, 1893.

201 *An Ordinance Granting the South Covington & Cincinnati Street Railway Company the right to change its tracks on Third Street west of Main Street, and on Bullock Street and Second Street, in the City of Covington, from a single track with turnouts to a double track.*

Section 958 (1). Be it ordained by the General Council of the City of Covington: That there is hereby granted to the South Cov-

ington & Cincinnati Street Railway Company the right and privilege of changing its tracks on Third Street west of Main and on Bullock and Second Streets, from a single track with turnouts to a double track, and for this purpose the said street railway company is hereby authorized and empowered, at its own cost and expense, and without cost and expense to the city of Covington, to widen Bullock Street from Third Street to Second Street, and Second Street, from Bullock Street to Western Row, so as to make said street not less than thirty-six (36) feet wide between curbs, and said streets shall be so widened before the double track is laid on said streets.

As a further consideration of this grant, the said street railway company shall remove and reconstruct the plank walk on the south side of Third Street, where said plank walk is now existing, so as to leave a space of not less than ten (10) feet between the south rail of said double track, on Third Street, and said plank walk as reconstructed, and said plank walk shall be reconstructed not less than six (6) feet wide, with proper guard rails.

202 As a further consideration of this grant, the said street railway company shall raise the grade on Third Street where the same passes over the Willow Run bottoms at lease twelve (12) inches above the present line of grade, and shall reconstruct said street so as to leave the same in good condition for the passage of vehicles, and to the satisfaction and under the direction of the Mayor and the Committee on Internal Improvements of the City Council.

Section 959 (2). All track laid under the provisions of this ordinance shall be laid in the way and manner prescribed, and subject to all the conditions for the laying of tracks in an ordinance entitled "An ordinance in relation to the South Covington & Cincinnati Street Railway Company," approved October 7, 1892.

Section 960 (3). That in the prosecution of the work herein provided for, the South Covington & Cincinnati Street Railroad Company shall give preference to the employment of home labor at the same price for which other labor can be obtained to do said work, and in the event of the failure of said railway company to comply with each and all of the terms of this ordinance, the same may be declared of no force and effect.

Approved April 26, 1894.

An Ordinance of the City of Covington Authorizing the South Covington & Cincinnati Street Railway Company to Change its
203 *Tracks from Certain Streets to Certain Other Streets in the City of Covington.*

Be it Ordained by the Common Council of the City of Covington, That:

Whereas, the South Covington & Cincinnati Street Railway Company now occupies a portion of Second Street, between Scott and Greenup Streets, and Greenup Street, between Second Street and Park Place, and Scott Street, between Second and Park Place, and operates thereon a street railway, its tracks on said streets connect-

ing the tracks upon the Suspension Bridge with the various routes operated by said South Covington & Cincinnati Street Railway Company; and,

Whereas, the City of Covington has requested that the said street railway company shall change its tracks and the operation of its street railway from said portion of said streets to Court Street and Park Place, all as more fully set forth herein; and,

Whereas, said City of Covington desires to widen Court Street on the east side thereof, between Third Street and Park place, and the said South Covington & Cincinnati Street Railway Company is willing to give to said city a strip of land twelve feet deep along said eastern side of Court Street, between Third Street and Park Place, from land owned by said South Covington & Cincinnati Street Railway Company; and,

Whereas, in the opinion of the Council, the said change of tracks from the streets first above specified to Court Street and Park
204 Place will be for the benefit of said city and the convenience of its citizens and of the traveling public, now therefore,

Be it Ordained by the General Council of the City of Covington:

Section 949 (1). That the South Covington & Cincinnati Street Railway Company is hereby granted the right of way, and is authorized and empowered to lay double tracks, and to construct, operate and maintain its street railway from the tracks on the Suspension Bridge over and across Second Street, at the necessary angle, to the center of Court Street; thence along and over the center of Court Street to Third Street, and across Third Street and over Court Street, as widened, as hereinafter set forth, to Park Place, on a straight line with its tracks on Court Street, between Second and Third Streets, and single or double tracks over and upon Park Place between Scott and Greenup Streets; and said South Covington & Cincinnati Street Railway Company is hereby authorized and granted the right of way to lay such curves, frogs, switches and crossovers as are necessary and proper, in its judgment, to connect said Suspension Bridge tracks with the tracks on Court Street, and to connect the tracks on Court Street with the track or tracks on Third Street, with the track or tracks on Park Place; also to connect its track or tracks on Park Place with its tracks on Scott Street and Greenup Street, and such other curves, frogs, switches, crossovers and other rails or appliances as may be necessary and proper, in its judgment, to the full use and enjoyment of the rights
205 herein granted; also to erect the poles and string the wires on and over said streets, which may be necessary or advantageous to the use of said right of way and to the operation of said street railway, as hereinabove set forth.

Section 950 (2). The said South Covington & Cincinnati Street Railway Company is to commence the work of laying said tracks within a period of four (4) months from the date hereof, unless prevented by the said City of Covington, or by delay in the improvement of said Court Street and Park Place; and said company further agrees, within a reasonable time after the completion and operation of its tracks as above set forth, to remove its present tracks on Green-

up Street, between Park Place and Second Street; on Second Street, between Greenup Street and the Suspension Bridge; also on Second Street, between the Suspension Bridge and Scott Street; also on Scott Street between Second and Park Place; and on Third Street, between Court Street and Greenup Street; and said streets shall be put by said company in as good condition and order as they now are, under the direction of the City Engineer of the City of Covington.

Section 951 (3). It is hereby ordained and agreed on the part of the City of Covington that the right of way over said streets from which the tracks are to be removed, as herein set forth, and the right to construct, operate and maintain a street railway, or to lay its tracks thereon, or to construct, operate and maintain any other system of passenger traffic on and over said streets, shall not at
206 any time hereafter be granted to any other person or corporation than the South Covington & Cincinnati Street Railway Company. In the event that the said City of Covington shall hereafter attempt to authorize any other person or corporation to occupy and use said streets, or any part thereof, from which the tracks are to be removed, for street railway purposes, or for the construction, operation and maintenance of any system of passenger traffic, then the South Covington & Cincinnati Street Railway Company shall have and retain the same rights to use said streets that it now possesses under existing laws and ordinances. In the event that for any reason the rights herein granted to said South Covington & Cincinnati Street Railway Company, in the first section hereof shall be taken away from the said South Covington & Cincinnati Street Railway Company, or said company shall be prevented in any manner from exercising said rights, or in the event that said company shall fail for any reason to effectually obtain said rights, it shall retain and possess in every respect the rights which it now has over and upon the streets mentioned in section two (2) hereof, and the land conveyed by it to said city, as set forth in the next section hereof, shall immediately revert to it, the South Covington & Cincinnati Street Railway Company.

Section 952 (4). The rights herein granted to said street railway company are granted in consideration of the benefits to the city of Covington, as hereinbefore set forth and otherwise, and in consideration of the conveyance by said South Covington & Cincinnati
207 Street Railway Company of a strip of land on the east side of Court Street, between Third Street and Park Place, fronting one hundred (100) feet on Court Street, and being twelve (12) feet in depth, which shall be dedicated and deeded to said City of Covington for said street purposes for the widening of Court Street after the passage of this ordinance, said land to revert to said South Covington & Cincinnati Street Railway Company upon the condition set forth in the preceding section hereof.

Section 953 (5). The rights and obligations of said City of Covington and the said South Covington & Cincinnati Street Railway Company shall be the same, as to the streets mentioned in section one (1) hereof as they now are with reference to the streets men-

tioned in section two (2) hereof under the laws and ordinances now in force relating thereto.

Section 954 (6). The said South Covington & Cincinnati Street Railway Company shall accept this ordinance in writing within thirty (30) days from its passage.

Section 955 (7) This ordinance shall take effect and be in force from and after its passage and approval by the Mayor.

Passed by the Board of Aldermen June 20th, 1901.

Passed by the Board of Councilmen July 1st, 1901.

Approved this 11th day of July, 1901.

W. A. JOHNSON, *Mayor.*

208 EXHIBIT D—COUNCIL ORDINANCE No. 9069.

Filed November 17, 1915.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,

v.

THE CITY OF COVINGTON, Defendant.

An Ordinance Providing for the Letting at Public Bidding of the Franchise of Entering in and upon Certain Streets and Ways of the City of Covington, Kentucky, for the Purpose of Constructing, Operating, and Maintaining a Street Railway Line for the Term of Twenty Years, Prescribing the Terms Thereof, and Granting said Franchise to the Highest and Best Bidder Therefor, Subject to the Right of the General Council to Reject Any and All Bids.

Be it ordained by the General Council of the City of Covington, Kentucky:

Section 1.

Advertisement of Franchise.—That the City Clerk of the City of Covington shall, upon the passage of this ordinance advertise by at least ten consecutive insertions in the official newspaper of the City of Covington and in the Engineer News, New York, The Engineering Record, New York, The Municipal Engineer, Chicago, and in the Electric Railway Reviews, of Chicago, that bids will be received by the City Clerk at his office, on the day of the first meeting of the General Council, ten (10) weeks after the first publication
209 of this ordinance as herein provided, between the hours of nine (9) A. M. and half past five o'clock (5:30) P. M., for the franchise right and privilege to construct, operate and maintain a street railway system in the City of Covington, for the transportation of passengers and freight, operating cars propelled by electricity

or other motive power, except steam, over such streets and ways as are hereafter named, and as may hereafter be designated as hereinbefore provided, and under such terms and conditions as are hereinafter set out, for a period of twenty (20) years, dating from the acceptance by the General Council of any bid. The City Clerk shall insert in said publication the day and month when said bids shall be received.

The City Clerk shall, at the session of the Board of Council held on the day fixed for receiving such bids, submit to such Board, so meeting on said date, or in case there be no meeting on such date, at the first regular meeting held after such date, which bids shall thereupon be considered in open session at such meeting; provided, however, that if no more than one bid be received, the Council may readvertise the franchise for sale, and if no bids be received, or if all bids be rejected, the Council may readvertise the sale of the franchise in like manner, under the terms of this ordinance. The General Council hereby reserves the right to reject any and all bids.

Each bidder must submit with his bid, a certified check for Five Thousand Dollars ($5,000.00), payable to the City of Covington. If the successful bidder shall fail to furnish the bond of Fifty Thousand ($50,000.00) Dollars herein required, within the time re-
210 quired in this ordinance, then said check shall be forfeited and become the property of the City of Covington as liquidated damages. Upon the execution and delivery of said bond within said period, and the payment of the cost of advertising this ordinance, said certified check shall be immediately returned to the successful bidder.

Section 2.

Franchise awarded to the Highest and Best Bidder.—There shall be awarded to the person, firm, company or corporation making the highest and best bid therefor, the following rights and privileges, to wit: Such person, firm or corporation shall have the right and privilege, to construct, operate and maintain lines of street railway along, through and over the following streets and ways in the City of Covington, together with the necessary plants, wires and poles and other apparatus, to-wit:

Streets Running North and South—
Garrard from Twentieth to Corporation.
Greenup from Twentieth to Government Place.
Scott from Government Place to Fourth Street.
Madison from Third to Kruse Avenue.
Decoursey (Latonia), from Thirtieth to Southern.
Huntington from Southern to Forty-fifth Street.
Eugenia from Southern to Thirty-fifth Street.
Carlisle, from Thirty-fifth Street to Corporation Line.
Latonia from Thirty-fifth Street to Corporation Line.
Russell, from Robbins to Thirteenth.
211 Holman, from Twelfth to Nineteenth.
Howell from Nineteenth to Twenty-first Street.
Eastern, from Fifteenth to Corporation Street.

Hermes, from Twelfth to Pike.
Main, from Third to Pike.
Crescent, from Second to Third.
Kruse Avenue, from Madison St. to Thirtieth St.
Court Avenue, from Second to Government Place.
Russell from Nineteenth to Twenty-first Street.
Streets Running East and West—
Second, from Crescent to Western Corporation Line.
Third, from Crescent to Court.
Fourth, from Main to & over the Covington & Newport Bridge.
Government Place, from Scott to Greenup.
Pike, from Madison to Western.
Montague, from Western to Western Corporation Line.
Robbins, from Russell to Madison.
Eleventh, from Greenup to Russell.
Twelfth, from Covington & Newport Bridge to Greenup.
Twelfth, from Russell to Hermes.
Thirteenth, from Russell to Holman.
Fifteenth, from Greenup to Eastern.
Corporation, from Eastern to Garrard.
Twentieth, from Garrard to Madison.
Nineteenth, from Russell to Howell.
Twenty-first Street (Central Covington) from Russell to Howell.
Thirtieth Street from Eugenia to Decoursey (Latonia), to Kruse Avenue.
212 Thirty-fourth Street from Eugenia to Decoursey (Latonia), and across Southern Avenue.
Thirty-fifth, from Carlisle to Eugenia.
Southern, from Decoursey (Latonia) to Huntington.

Also, on Western Avenue, from Second to Montague and through such portion of Devou Park as may be directed by the Board of Street Railway Commissioners.

Together with the right to use to, into and over all bridges and bridge entrances, all rights of way and passage that are now or may be under the control of the City of Covington.

Within one year from date of acceptance the grantee shall have in operation a line of railway between the City of Covington, and Erlanger, Kentucky. All extensions of the line of the grantee, constructed under this ordinance, shall be governed by the terms of the same.

2. Term of Franchise.—The franchise herein granted shall continue for a period of twenty (20) years, from the date this ordinance goes into effect, provided, however, that the successful bidder therefor, its successors and assigns, shall begin the construction of its street railway system over all the streets and ways mentioned herein with sixty (60) days from said date and shall complete and operate the same within two years from said date, unless the time shall be further extended by the General Council, or unless the construction of said system be resisted by legal or forceful process, or by conflicting rights, and the duration of such time shall not be considered a part of said term of two years.

Provided, however, that if the grantee shall have or acquire street railway lines already existing and in operation upon the street
213 or any of them in this ordinance specified, and shall conform the same to the requirements of this ordinance, it shall not be necessary to replace the same with new construction. The successful bidder, in constructing its system of street railways, shall not close more than two streets running north and south, nor more than two streets running east and west, at any time, and shall not, at any time, deprive the public of the use of more than six square- of any street upon which construction work is proceeding.

3. Bond. Acceptance of Franchise.—Upon the acceptance of any bid, the successful bidder, hereinafter designated the grantee, shall execute a bond payable to the City of Covington, in the sum of Fifty Thousand ($50,000 00) Dollars, with some Fidelity or Guarantee Company, authorized to do business in the Commonwealth of Kentucky, as surety. Said Bond shall be conditioned for the faithful performance of the obligations, terms and privileges of this contract and every section thereof, and of any ordinance hereafter enacted by Council, and every order, regulation or requirement of the Board of Street Railway Commissioners. Said bond shall be further and particularly conditioned as provided in Sections 8 and 12 hereof. Upon the execution of said bond and the acceptance and approval of same, and the filing with the City Clerk of the City of Covington within thirty days after the acceptance of the franchise bid, its certificate of acceptance and all the conditions, terms, and provisions of this ordinance, the said certificate to be executed under the corporate seal of the said grantee, if a corporation, duly attested by the President and Secretary thereof, then the same and this ordinance and the said bond shall constitute the grant of said franchise, right and privilege herein set out to said grantee, and shall
214 constitute a contract between the said grantee, and the City of Covington, according to the terms and conditions of this ordinance, and of said bid and bond.

Said bond may be put in suit upon each and every violation of the provisions of this ordinance or any subsequent ordinance not inconsistent herewith, or any violation of said ordinance, requirement or regulation of the Board of Street Railway Commissioners, as often as the same or any provisions thereof are violated, and said bond shall be renewed and new surety given whenever and as often as the City may require. After the grantee shall have begun the operation of its street railway system herein required, said bond may be cancelled and surrendered for a new bond in a smaller amount, and with new sureties in the discretion of the General Council.

Section 3.

1. Forfeiture.—In case of the failure of the grantee to do and perform each and every one of the terms and conditions herein stipulated, to be performed by it, or its failure to comply with any ordinance of the City of Covington relating to street railroads, or with any order, regulation or requirement of the Board of Street

Railway Commissioners, now or hereafter in force and not inconsistent with the specific provisions of this ordinance, and such failure shall continue for six months after written notice to the grantee from the City of its intention to execute a forfeiture by reason of such failure, the grantee shall thereupon forfeit all and singular the rights and privileges herein granted and thereafter all such rights
215 and privileges shall cease, and said bond shall be forfeited to the City of Covington, and the grantee, by the acceptance of this franchise, hereby agrees upon said sum of Fifty Thousand ($50,000.00) Dollars, as liquidated damages for said breach, or in the event the City does not, at its discretion, proceed to execute a forfeiture, it shall be punished as provi-ed for in Section XXXIV, Sub-section 15, or as may be otherwise provided under this ordinance.

2. Waiver of Claims.—The acceptance of this bid of the grantee by the General Council, and the taking effect of this ordinance, shall be and constitute a surrender, termination and cancellation of all the grants and franchises, of every kind, character and description, received, acquired, owned or claimed by the grantee, and the principal for whom acting, from the City of Covington, or from any other source of authority to operate a street railway system or any part thereof within the limits of the City of Covington, as now or hereafter constituted.

Section 4.

1. Assignment of Franchise.—The grantee, its successors, and assigns, shall not assign or transfer this franchise, without first obtaining the consent of the General Council.

Before the grantee, its successors and assigns, shall sell, assign, lease, set over or transfer the franchise or any of the rights and privileges herein granted, to any other person, company or corporation, it or they shall file with the General Council a statement of the intent to do so, particularly describing the part or interest to be sold, the person, company or corporation to whom it is intended to
216 sell, lease, assign or otherwise transfer, verified by the certificate of the grantee herein, and such sale, assignment or other transfer shall not become effective until the assignee or transferee shall have filed with the City Clerk a good and sufficient bond, as provided for in Sub-section 3, Section 2, conditioned as the bond herein required of the grantee. In case of sale of foreclosure, the purchaser shall file with the City Clerk a declaration of ownership, and good bond as above required, three months after entering into possession under said sale; otherwise, the franchise and grant as to him shall be void.

2. The City of Covington shall have the right, at any time during the term of this franchise, if so authorized by law, to purchase the street railway system operated by the grantee, to wit: all wires, tracks, poles, power houses, cars, real estate and other tangible property used in the operation of the said street railway system, a price not to exceed the estimated actual value of all of the said tangible property, based on the original cost of land, plus the cost of reproduction

of the remainder of the tangible property, less depreciation for wear, tear, and obsolescence, excluding any allowance for good will, franchise value or appreciation of land. If such purchase be made during the first year of this contract, twenty (20) per cent of the value of the tangible property shall be added, and if the purchase is made during any subsequent year, one (1) per cent for each year's duration of the franchise shall be deducted.

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Section 5.

Home Labor to be Employed.—The grantee, in the prosecution of the work herein provided for, shall give preference to the employment of home union labor, at the prevailing market price.

Section 6.

Penalty for Violating Ordinance and Orders.—The City of Covington may, by ordinance, provide a penalty to be imposed upon conviction in the Police Court, upon the grantee, its agents or officers, for violation of this ordinance or any subsequent ordinance which the City Council may by law pass, or for the violation of any order or regulation of the Board of Street Railway Commissioners. The Bond herein required shall be security for the payment of said fine or penalty, and for the payment of any penalty or forfeiture imposed by the provisions of this Ordinance, or which may be imposed by Council or by an order of the Board of Street Railway Commissioners, not in conflict with any ordinance of the General Council.

Section 7.

Control Reserved to City.—The City of Covington reserves to itself the entire control of the service, including the right to fix schedules, rates and routes, including routes and terminals of interurban cars, the character of cars, and the right to increase or diminish the service, and nothing contained in this ordinance shall be construed to be a limitation or restriction upon the right of the City to exercise such other rights to control the operation and maintenance of the street railway system as may now or hereafter be conferred
218 upon the City by the laws of the Commonwealth of Kentucky, or otherwise, or to enforce this ordinance or any subsequent ordinance or any order of the Board of Street Railway Commissioners by legal proceedings.

Section 8.

City Exempt from Liability.—Said Grantee, its successors and assigns, shall at all times protect and save harmless the City of Covington, from any and all criminal and civil liability and claims, actions or damages of every kind and description, which may occur to or be suffered by the City of Covington or by any person or persons, firms or corporations, by reason of the construction, operation

or maintenance of its line of railway, or condition thereof, or by reason of the occupation of the right of way hereby granted, or by reason of a change of grade of any street, by reason of the right of way hereby granted, or by reason of the operation of its line of railway, or from the motive power, appliances, apparatus, wires, poles and appurtenances used in the construction, maintenance or operation thereof or in connection with, or which may result by reason of the defective condition of that portion of any street which the grantee is required to construct or maintain, or which may result from the breaking of any sewer, cistern, water or gas pipe, or that may be caused by the construction or repair of any cistern, sewer, water or gas pipe, where such condition results in any way from any act or omission of the grantee, or which may result in any way from the granting of this franchise, or any ordinance hereafter made
219 necessary to carry out the provisions thereof, or any act or omission of the grantee, or any order, regulation or requirement of the Board of Street Railway Commissioners. The City shall always have the right and privilege of temporarily obstructing or removing the tracks of said grantee, for such time as may be necessary for the building, rebuilding or repairing of any street, cistern, sewer, culvert, water or gas pipe, street or other work authorized or ordered to be done by the City Council, or the Board of Street Railway Commissioners. And the grantee as soon as practicable, at its own expense, shall place the portion of said street or track so removed or obstructed, in as good condition as it was before. In case any action or suit shall be commenced against the City for damages, arising in respect to any matter herein set out, or in the event the City shall be prosecuted criminally, said grantee shall, in case judgment be rendered against the City in such action or suit, or the City be convicted, fully satisfy said judgment within ninety days after such action or suit shall have been finally determined, if determined adversely to the city.

Section 9.

Other Companies: The City reserves the right to grant to any other person, company or corporation, the right to jointly occupy and use for street, interurban and electric railroad purposes, the tracks, poles, wires and electric current herein authorized to be maintained and operated, and all other appliances and power now or hereafter used for street railway purposes, upon the payment to
220 the grantee of such sum annually as may be agreed upon by such person, company or corporation and the grantee, or in the absence of said agreement, upon the payment of such sum annually as may be determined by the Broad of Street Railway Commissioners. The person, company or corporation obtaining or operating under this franchise shall receive upon its tracks and transport upon its lines and by its motive power, and upon the lines and by the motive power of other railways with which it has or may acquire traffic rights or privileges, the cars both freight and passenger, and the freight and passengers or interurban railways and railways operated by motive power other than steam, coming into the City and

desiring transit or transportation to points in the City of Covington and to other points upon other railways with which the person, company or corporation obtaining or operating under this franchise may have traffic rights and privileges. The City of Covington reserves the right to authorize any interurban railway or railway company operating by motive power other than steam to construct and use a third rail along the track laid under the provisions of this ordinance in order to accommodate cars requiring tracks of general standard gauge. The terms upon which such transit and transportation shall be had, shall be fixed by agreement between the person, companies and corporations concerned, but in case they cannot agree, then such terms shall be fixed by the Board of Street Railway Commissioners provided for herein.

Provided, however, that no right mentioned in this section shall be granted to such other person, company or corporation, except as may be necessary to provide inlets to the City for interurban and electric railways, and said interurban and electric railways shall be granted the rights herein mentioned, including such rights of ways as shall only be sufficient to enable them to reach their terminal by a direct and convenient route.

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Section 10.

Plans to be submitted.—The grantee, before constructing a street railway, or any extension, branch or alteration thereof, shall file with the Board of Street Railway Commissioners, a plan showing the location of its proposed tracks, sidings, turnouts and switches, the pattern of its rails, and the kind and character of foundation or roadbeds, proposed to be laid. In case the grantee proposes to use a conduit or subway through which motive power shall be supplied for the traction of cars, such plans shall show the size, location and manner of construction of such proposed conduit or subway, the width or position of the slot or opening therein; and in case such Company proposes to use overhead means or system whereby motive power shall be supplied for the traction of cars, such plans shall show the size, character and location with respect to the roadway or curb line, of the posts, poles or other supports proposed to be placed in any street or way, and to be used to maintain or support such overhead means or system, and the said plan shall be subject to the approval of the Board of Street Railway Commissioners. The grantee in constructing a railway or any part thereof, shall lay its lines of track of the standard width or gauge between rails in this vicinity, and in such manner that the top of its rails shall be level with the surface of the roadway of the street upon which it is laid.

222

Section 11.

Extensions, Betterments, Permanent Improvements.—Meaning.—The words "extensions, betterments and permanent improvements" as used in this ordinance, in contradistinction from repairs, maintenance, renewals and replacements of property, shall be held to mean

the acquisition, construction and equipment of additional lines of street railway, power-houses, switches, sidings, car-houses, shops, rolling stock, machinery, and other property or additions to existing equipment, or difference between cost of new sources of power, or new methods or propulsion, and the cost of the source of power or method of propulsion re-laced, if new at the time of replacement, and all expenses incident to such construction and acquisition; and also, wherever any property of the grantee is replaced by other property, at a greater cost than would be the first cost of such property, if purchased at the time of replacement, then such excess cost shall be deemed an extension, betterment or permanent improvement within the meaning of these words as used in this ordinance. In the event of any di-agreement between the Company and the City with regard thereto, the Board of Street Railway Commissioners shall have the power to determine, under the provisions of this ordinance, what proposed expenditure by the Company are for extensions, betterments and permanent improvements.

223 Section 12.

Extensions, Betterments, and Permanent Improvements Guaranteed.—In the event the grantee shall acquire by purchase, lease, or otherwise, the present street railway system and equipments now used, in the City of Covington, then and in that event the grantee will guarantee to the City of Covington, a further expenditure of One Hundred Thousand Dollars (100,000) in extensions, betterments and permanent improvements, within two years from the acceptance of this franchise. In the event the grantee shall not acquire the present street railway system, then it agrees to expend the sum of One Hundred Thousand ($100,000) Dollars over and above and in addition to the sum required to be spent in the construction of such system, as may be required to comply with the provisions of this ordinance, provided, further that the sum expended for the purchase of the double truck pay-enter cars, or in the construction of the Devou Park Western Avenue or Erlanger extension, shall not be considered or credited as a part of the $100,000 expenditure herein guaranteed.

Section 13.

Extensions, Betterments and Permanent Improvements—Who may propose.—Either the grantee or the Board of Street Railway Commissioners may propose extensions, betterments or permanent improvements. Whenever any extension, betterment or permanent improvement is proposed by the Board of Street Railway Commissioners, estimates of the cost thereof and the plans and specifications thereof shall be filed with the grantee by the City, and when-
224 ever any extension, betterment or permanent improvement is proposed by the grantee, estimates of the cost thereof and plans and specifications thereof, shall be filed with the Board of Street Railway Commissioners; provided, however, that the right of the Board of Street Railway Commissioners to propose extensions,

betterments and permanent improvements, shall terminate whenever the unexpired term of this franchise, or any renewal thereof, is less than five years.

2. Board of Street Railway Commissioners to Approve Plans.—Ability of Grantee to Comply with Order.—When such extensions, betterments or permanent improvements proposed by the grantee have been approved by the Board of Street Railway Commissioners or when estimates of the cost and plans and specification of any extension, betterments or permanent improvements proposed by the Board of Street Railway Commissioners have been filed with the grantee, such extensions, betterments or permanent improvements shall be made, if the grantee acting in good faith and using all usual means, can procure the necessary money, from any fund on hand or by the sale of stocks or bonds or by an increase of floating debt, unless the grantee shall claim in any such case that it is unable to finance said extensions, betterments or permanent improvements, in either of which cases the claim of the Company shall be submitted to the Board of Street Railway Commissioners. Provided, however, that the expenditure of the $100,000 hereinbefore required, or the extension, betterments or permanent improvements herein specifically mentioned and required, shall not be subject to such arbitration.

225 Section 14.

Special Cars.—The Grantee may transport upon and along its lines, in suitable cars, such materials, supplies, appliances and tools as it may need for the construction, maintenance and operation of its road. It may carry upon its passenger cars, or upon other cars, mail for the Government of the United States. It may operate funeral cars, observation cars, express passenger service, and other special cars, at the rate to be fixed from time to time by the Board of Street Railway Commissioners of the City of Covington, not lower than the rate in force for the carriage of passengers provided by the terms of this ordinance. The grantee shall also operate hospital and supply cars for the city and such other cars for exclusively municipal purposes as the City shall direct; and the City shall furnish and maintain such cars, and shall pay the cost of operating such cars, to-wit, the wages of all employees of the Company in charge thereof, but exclusive of any cost of current and any contribution for fixed charges, or for track maintenance or renewal. The transportation of materials, tools, supplies, appliances, and mail, and the operation of special cars, shall not be permitted to interfere with or delay the carriage of passengers and shall at all times be subject to regulation by the Board of Street Railway Commissioners.

Section 15.

Equipment—Rails, Wires, Poles—Maintenance of Same.

The City of Covington expressly reserves the right and power to

require all wires of the grantee to be placed under ground,
226 at the expense of the grantee, whenever deemed proper and expedient and the grantee can, upon thirty days' notice to the City, put the wires under ground whenever it so determines, unless sooner ordered by the Board of Street Railway Commissioners. The said grantee binds itself to replace all streets where the wires are put under ground, at its own expense, and to the satisfaction of the Board of Street Railway Commissioners.

All poles, erected under the provisions of this ordinance, shall be of tubular iron and shall be placed inside of and abutting against the curb of any street or way, and shall not occupy at any point above the surface of the sidewalk thereof a space for each pole of more than ten inches in diameter. The foot of each poles shall be buried in the earth to a depth of at least four feet from the surface and shall not extend in height from the established grade of any of the said streets or ways, more than twenty-five feet nor less than seventeen feet, and shall stand, when wires are strung thereon, as nearly vertical as will be practicable, and all of said poles shall be of sufficient strength to withstand double the amount of strain to which they will be subjected. All wires, including span wires, trolley wires and feed wires, which shall be strung upon the said poles, shall be so strung in the following manner; the supporting or span wire shall be strung from oppo-ite poles upon the said streets or ways, and shall be of galvanized twisted iron cable and fastened to each pole by substantial soft steel clamps, and shall be thoroughly insulated and at least seventeen feet above the established grades of said
227 streets or ways, and the same distance above intersecting streets or ways. All wires shall be strung longitudinally from pole to pole, to be thoroughly insulated and securely fastened to each of said poles by means of iron cross arms placed at the top of said poles, and not less than twenty feet from the established grade of said streets or ways, and the same distance above intersecting streets or ways, provided, that where there is an artificial obstruction which shall prevent said feed wires from being suspended the said distance above the said grade and in the manner provided, then the same shall be suspended under such artificial obstruction and as near thereto as shall be found safe and convenient to the public travel on said streets or ways, and the uses of said obstruction. All trolley wires shall be suspended from the span or supporting wires and placed over the center of each set of tracks, switches, cross-overs and turnouts, which may be laid in the said streets or ways herein designated, and shall be fastened to the said span or supporting wires by good and sufficient insulators, and shall be at all points suspended as aforesaid at not less than seventeen feet above the established grade of said streets or ways, provided that where there is an artificial obstruction, which would prevent any wires from being suspended the distance above the grade of said streets or ways in the manner hereinbefore specified, then the same shall be suspended under such artificial obstruction and as near thereto as may be found safe and convenient to the public travel on said streets or ways, and to the uses of said obstructions. To each span wire there shall be

attached a strain insulator with at least three inches takeup,
228 and at a distance not *more* to exceed two thousand feet along the line there shall be also attached an additional strain insulator, so as to furnish double insulation for the span wires at those points. All span wires shall not be less than three-eighths of an inch in diameter and of seven strand galvanized steel wire.

No poles shall be erected under this ordinance in the center of streets or ways, or in a position to obstruct travel. Whenever there are or shall be electric light or telephone wires erected upon any or all of the streets or ways mentioned in this ordinance, or occupied by the grantee, the City may require the wires suspending the electric feed wire to be attached thereto and require the removal of any and all unnecessary poles erected under this ordinance.

All trolley wires shall be of the best material and of standard make, and not less than ninety-eight (98) per cent. conductivity.

The feed wires shall be supported on glass insulators and at all points where it is necessary to make joints or connections, shall be wrapped with standard insulating tape.

All anchor wires shall be of standard material, sustained or connected by insulators, and the entire lines when finished shall present a neat and workmanlike appearance, and all poles shall rake evenly, wires shall be straight and free from kinks or bends, the span wires of an uniform sag, and all trolley wires pulled up tight.

Section 16.

Fire Department May Cut Wires, etc.—In case of fire,
229 the Fire Department of the City of Covington shall have the right, without notice, to cut or remove any of the aforesaid wires, for the purposes of more readily and safely extinguishing any fires in said City. The grantee will not make any claim upon the City by reason of the wires being cut for the purpose aforesaid, or damages resulting by reason thereof, directly or indirectly, and the same shall be replaced at the expense of the grantee.

Whenever other lines of wire cross the wires to be strung by this ordinance, the latter wires shall be protected by guard wires or other suitable mechanical device as may be directed by the Board of Street Railway Commissioners.

Section 17.

1. Tracks.—The tracks herein authorized shall be of standard gauge, prevailing in this vicinity, and laid as near as practicable to the middle of the street over which the same shall pass, or if on one side, then under the direction of the Board of Street Railway Commissioners.

2. Change of Grade.—Whenever the City shall by ordinance change the grade of any street occupied by the tracks constructed under this ordinance, then the grantee hereunder shall, at its own cost and expense, change the track to conform with said grade within sixty days after receiving notice from the City Council to make

such change and failing to do so, the City may make such change and collect the cost of the same, with ten per cent. in addition to the cost, as a penalty.

230 Section 18.

Manner Crossing Tracks Other Companies.—Whenever, in the construction of the tracks herein authorized it becomes necessary to cross the line of any street or other railway occupying any of the streets or ways of the City, the grantee shall have the right to lay the tracks herein authorized across such other tracks. Whenever the right has heretofore been or shall hereafter be granted by the City Council to any person or company to lay street or -ther railway tracks, across the tracks owned by the grantee, such person or company shall be permitted to put in whatever appliances may be necessary for the proper crossing and non-interference with the motive power of the grantee.

Section 19.

Character and Equipment of Cars.—The grantee, at once upon the taking effect of this ordinance, shall proceed, by the acquisition of new cars, to extend the pay-enter system of the collection of fares; and within one year from date shall have all cars operated by it equipped with pay-enter appliances. The phrase "pay-enter" as used in this ordinance, shall be held to mean a car equipped with fare box, and so arranged as effectively to provide for the prepayment of fares, by passengers. All of said cars shall be equipped with air brakes and shall be what is known as double truck cars, not less than forty-four (44) feet in length and providing seats for not less than thirty-eight (38) persons. Cars shall be equipped with closed front and rear vestibules for motormen and conductors, which vestibules shall be heated in winter seasons, and stools shall be provided for both motormen and conductors.

231 Section 20.

Freight—Cars Not to Block Streets When Loaded, etc.—In moving freight over the line, cars shall be so managed as not to stand upon the streets or to block traffic or to travel upon the streets except so far as may be necessary in the ordinary operation of the cars. Freight shall not be loaded or unloaded on said cars on the street. The grantee shall not build, under this ordinance any platforms or other structure in any street or alley. The cars used for carrying freight shall conform in general external appearance to the passenger cars of the grantee, except in respect to the number and location of windows. Said cars shall be painted and varnished in the manner as the passenger coaches of the grantee, and shall not be unsightly or offensive. No cars shall ever be operated by steam over the said line or any part thereof.

Section 21.

Freight Rates.—The grantee shall not, in the receiving or shipping of freight, discriminate to the injury or detriment of any person, firm or corporation, but shall receive and carry from any and all persons, firms and corporations, upon the same rates, terms, and conditions in all respects, and said grantee shall have printed and posted in conspicuous places about its depots, the rates for freight, and any contracts of rebate or other agreement whereby one shipper shall be secured cheaper rates of toll than another shipper shall be held and considered as a discrimination.

232 Section 22.

Persons to be Carried Free.—During the continuance of this franchise the grantee shall carry upon its cars free of charge, all policeman and firemen of the City of Covington in uniform and on duty, and shall otherwise give no free passes or free transportation except to employees of newspapers or to motormen, conductors and inspectors of the grantee, in uniform or upon presentation of badge, and the grantee shall have the right to furnish to its other employees free transportation while on duty or going to and from work. The grantee shall, by the adoption of all reasonable protective measures, and by necessary supervision of its employees and accounting force, provide for the collection of the fares due the Company from passengers. If, at any time the Board of Street Railway Commissioners notifies the grantee that, in its judgment, any laxity, carelessness or inefficiency exists in the manner of collecting the revenue of the grantee, or in permitting free transportation in any way, or any wastefulness exists in the purchase or use of material, or employement of persons, or their compensation, the Board of Street Railway Commissioners shall have the right to determine the facts. If, as the result of such investigation, it is found that any such failure to collect revenue or wastefulness or laxity, carelessness or inefficiency as above set out exists, it shall be at once corrected and the City Auditor may compute and estimate from the best source of information at his command, the amount of additional revenue that would have been derived by the grantee, had it complied with the pro-
233 visions of this ordinance, and shall add the same to the amount reported or found to have been earned by the grantee as provided for in Section 30.

Section 23.

Rates of Fare, Children under Six years of Age.—Any child under six years of age accompanied by a person paying fare, shall be carried free. Two persons under six years of age when accompanied by a person paying fare, shall be carried for a single fare. School children going to and from school in the City of Covington, from any point within the County of Kenton, shall be carried for two

cents cash fare, between the hours of 7 and 9 A. M. and the hours of 3 to 5 P. M.

Section 24.

Rates of Fare.—Subject to the exceptions herein set out, the grantee shall maintain and charge, during the term of this contract, for one continuous ride, a cash fare of five cents and no more, upon its cars between any point on its line in the City of Covington, as the city corporate limits now are or may hereafter be constituted, and any point upon its line in the City of Cincinnati, Ohio, or in Campbell County, Kentucky. The grantee shall maintain and charge, during the term of this franchise, a three-cent cash fare for one continuous ride from any point within the city limits as same now are or may hereafter be constituted, to any other point upon its line in the County of Kenton, and from any point upon its line in the County of Kenton to any point upon its line in the City of Covington,
234 as the limits of the same now are or may hereafter be constituted.

In the event the grantee shall reduce its cash fare between points in the City of Covington or County of Kenyon and points in the City of Cincinnati, Ohio, or Campbell County, Kentucky, it shall also reduce its cash fare between points in the City of Covington and points in the County of Kenton, to three-fifths of the cash fare between said points on its line.

Section 25.

Tickets.—The grantee shall sell tickets at the following rates:

(*a*) Where the cash fare is five cents, six tickets for twenty-five cents.

(*b*) Where the cash fare is three cents, seven tickets for twenty cents.

(*c*) School children's tickets shall be sold ten for fifteen cents, good between the hours of 7 to 9 A. M.

(*d*) In the event the grantee shall reduce its cash fare the rates for tickets sold in the above numbers shall be proportionally reduced, fraction of cents, if any, to be dropped.

The transferring from one car or line of the grantee to another car or line shall be held to be a continuous ride. The term "line" or "lines" as used in this ordinance shall be construed to mean and include all lines owned, operated, controlled or leased by the grantee within the Counties of Hamilton, Ohio, Campbell and Kenton, Kentucky, or the lines of any company with which the grantee may have any agreement or understanding in the operation of grantee's cars over said line, within the said counties.

235 Section 26.

Transfers.—Transfer checks shall be given and accepted by the grantee for one fare or ticket from each and every line to each and every line within the counties of Kenton and Campbell, Kentucky,

and Cincinnati, Hamilton County, Ohio, that is; All lines running in a general northwardly or southwardly direction, shall transfer to those lines running in a general eastwardly or westwardly direction; and all lines running in a general eastwardly or westwardly direction, shall transfer to those lines running in a general southwardly or northwardly direction. Provided, that transfers shall be given between lines running in the same general direction or in the opposite direction where such transfer is necessary to enable passengers to reach their destination; provided, however, that this provision shall not be interpreted to require the grantee to carry passengers a round trip for one fare.

Section 27.

Number of Passengers to Ride in Car.—The grantee shall not permit more than one-third greater in number of passengers to ride or to be transported within such cars and above the number for which seats are provided in the same, provided that this section shall not apply to or be enforced on the days celebrated as Fourth of July, Decoration Day or Labor Day.

2. Ingress and Egress to Cars.—Penalty for Obstructing. The grantee shall not suffer or permit any passenger or person to ride upon the rear platform of any such car unless the same be
236 provided with a suitable rail or barrier so arranged as to provide an open space reasonably sufficient for ingress and egress of passengers to and from such cars, and no one shall be permitted to stand in such place so provided for such ingress and egress, but the same shall at all times be kept clear, free and open. Any person refusing to vacate such open space provided for ingress and egress, upon the request of the conductor in charge of said car, shall be guilty of a misdemeanor and shall be subject, upon conviction, to a fine of not less than Five Dollars nore more than Fifty Dollars, recoverable in the Police Court of the City of Covington.

3. Rails on Platform.—The grantee shall not suffer or permit any person or passenger to ride upon the front platform of any such car unless a rail or barrier be provided, separating the motorman from the balance of said front platform; said place allowed for the motorman shall in all cases be sufficient to permit him to properly and conveniently operate the mechanism controlling said car, without interfering or crowding from the other persons upon said platform, if any, and no person or passenger shall ever be permitted to stand by or remain within the enclosure thus provided for the motorman.

4. Sanitation of Cars.—It shall be the duty of the grantee at all times to keep the cars thoroughly cleaned and ventilated, and it shall at least once a week fumigate the inside of said cars with efficient disinfectant, and the Board of Health of the City of Covington, shall have power and authority to prescribe reasonable rules providing for the cleanliness, ventilation and fumigation of such cars, and the grantee shall comply with such reasonable rules.

237 5. Temperature.—The temperature of such cars shall never be permitted to be below 50° Fahrenheit.

6. Sufficient Cars to be Operated.—Penalty for Violation.—Owl Cars.—The grantee shall run and operate cars in sufficient numbers at all times to reasonably accommodate the public within the limits of this ordinance as to the number of passengers permitted to be carried, and the Board of Street Railway Commissioners of the City of Covington may by resolution at any time direct that the number of cars operated on any line or route be increased to a sufficient number to so accommodate the public, if there is a failure in that respect. The grantee failing or refusing to run or operate sufficient cars as by this section provided, shall be subject to penalties provided, shall be subject to the penalties provided by Sub-section 2 hereof, or to such other penalties as may be provided or authorized hereunder, at the discretion of the City.

The grantee shall operate owl cars over each route, any portion of which may lie in the City of Covington, at least one such car to make continuous uninterrupted trips during and between the time cars on said routes shall cease, and the time such cars shall begin to operate under the regular schedule.

7. Grade Crossings.—Street Railways.—The grantee in operating passenger or street railway cars, when approaching crossings of other passenger street railway lines or routes, must have its cars approach all such crossings slowly and under complete control, and every car must be brought to a full stop within a car length of and be-
238 fore passing over every such crossing, and when it is necessary that the car of one such line or route should wait in order that a collision may be avoided, the line or car not having the right of way must hold its car at a full stop until after the passage of the other car.

8. Grade Crossings.—Steam Railroads.—When the tracks of the grantee cross at grade the tracks of a railroad operated by steam, before the car of the grantee shall be allowed to cross the tracks of any such railroad, it shall be brought to a full stop and it shall be the duty of the conductor, or person in charge of said car, to go forward and ascertain that such car can be passed over such crossing in safety, before such car shall be allowed to proceed.

9. Fire Department, Police and Patrol Wagons to Have Right of Way.—The grantee shall yield the right of way to the Fire Department when going to fires, and to police patrol wagons when answering calls, and if then signaled by any person in charge of any fire apparatus or police patrol wagon, shall bring its car to a full stop until after the passage of such fire apparatus or police patrol wagon.

10. Cars to be equipped with Creepers.—No car operated by the grantee shall be passed over any hose or other apparatus of the fire department when the same is laid or in use for the purpose of extinguishing fire, unless such car be passed over the same upon a creeper or other device approved by the Board of Street Railway Commissioners, and which shall fully protect such hose or apparatus, and it shall be the duty of the grantee to equip its cars with such creeper or other device.

239 11. Electric Device Supervised by Board of Street Railway Commissioners.—In all cases where the grantee may use elec-

tricity as a motive power, the entire system used, and all the devices, means and apparatus used in the supply, application or use of the power in all respects which in any manner affect or endanger the safety of the public shall at all times be kept open to the inspection of and under the supervision of the Board of Street Railway Commissioners.

12. Same.—Electromotive Force.—When and so often as may be required by the Board of Street Railway Commissioners, the grantee shall furnish to said Board a statement showing the amount of electromotive force used, and the current strength conveyed or used upon its wires and said Board shall at all times have the right to inspect and test same.

Section 28.

1. Cars to Stop for Passengers—Exceptions.—It shall be the duty of every motorman, or other servant running any car to bring his car to a full stop at a corner of the streets as herein provided, whenever requested, signaled or motioned by any person standing on such appropriate corner desiring to board such car, or by the conductor of such cars or whenever so requested, signaled or ordered by the conductor or any passenger of such car desiring to leave such car, and in every instance such car shall remain stationary for a sufficient length of time to enable passengers to safely board or leave such car; provided, that a car in which there are no unoccupied seats need not stop to receive passengers when such pas-
240 sengers may board a succeeding car which is at the time within three hundred feet of the first car and bound over the same route throughout.

2. Cars Passing Other Cars—to slow down.—Whenever any car is about to pass another car going in the opposite direction, at a point where it is permissible to passengers to alight from or board such car, said car shall proceed at a rate of speed not to exceed three miles per hour, and the motorman, driver or person in control, shall ring a warning gong or bell. All cars running on a route any portion of which is not lighted by street lamps shall carry on the rear end a lantern containing a coal oil light.

Section 29.

Construction, Repair, and Maintenance of Streets.—The said grantee's track extension and rails thereof shall conform to the present and any future established grade of the street or streets upon which the same are or may be located, and in the event the grade of the street upon which any track may be laid is changed, the grantee shall change the track to conform to the established grade, at its own expense.

Said grantee shall pave in the same manner and with the same materials as the rest of the street is paved, or as may be designated by the General Council of the City of Covington, the whole line of the right of way herein granted, including such rights of way here-

after to be granted under this ordinance, between the rails and for a space of eighteen inches outside of each rail of the track.

In the — that the grantee shall fail to so pave or repave any
241 street, the construction or reconstruction of which may be ordered by the General Council, within ten days after being notified to repave, then, upon notice of its intention to do so, the City of Covington may proceed to repave said street or streets, and assess the cost of that portion of the street herein required to be paved, maintained and repaired by the grantee, in such manner as is designated by Section 3096, City Charter.

Said Grantee shall clear snow from its tracks in such manner as may be approved by the Board of Street Railway Commissioners and shall keep the streets within its tracks and four feet on the outside of each track, in a passable condition for public travel in the winter season. All surplus snow thrown by the plow to either side of the street shall be removed by the grantee within forty-eight hours, or in the event of a prolonged storm, within a reasonable time after the discontinuance of the storm.

Section 30.

Return to be Made to the City Auditor of Gross Receipts.—The grantee, or if the same be a Corporation, its President, Secretary or Treasurer, shall, on or before the tenth day of January of each year, make a return under oath to the City Auditor of the gross receipts of the previous year, who shall immediately transmit the same to the City Council and the Board of Street Railway Commissioners, which report shall be published in full in the official newspaper of the City of Covington. Said gross receipts of the grantee shall be construed to mean all the receipts earned by the grantee in
242 the operation of *of* street cars any part or portion of which trip lies within the City limits of Covington as now or hereafter constituted in making such trip, or any line of the grantee in Hamilton County, Ohio, and Kenton and Campbell Counties, Kentucky. In case of the neglect or refusal of the grantee or its officers to make such return, the City Auditor shall, to the best of his ability, estimate the gross receipts at a sum not less than ten percent. increase upon the last report made by the grantee of its gross receipts, if such report has been made. Said estimate shall be subject to the approval of the General Council and shall likewise be published in the official newspaper of the City of Covington.

Section 31.

License Tax.—The grantee shall pay to the City of Covington annually, upon the first day of February, in addition to such taxes authorized by law, for and during first ten years of the term of this franchise, not less than Twenty-five Thousand Dollars ($25,000) per year, and for and during the second ten years of the term of this franchise, not less than Fifty Thousand ($50,000) Dollars. All bidders shall specify what amount, if any, in excess of said amounts

they will pay to the City of Covington for this franchise. In the event said license tax is not paid when due, this franchise may be forfeited or said license tax may be collected with ten per cent. penalty in the discretion of the City.

Section 32.

Sworn Statement of Mileage, Correction of Same.—It shall
243 be the duty of the said grantee to make report under oath to the Board of Street Railway Commissioners on or about the tenth day of January of each year, of the length of track laid, constructed, maintained or operated as aforesaid by such grantee, and the Board shall thereupon transmit said report to the City Council and the City Auditor, which said report shall be published in the official newspaper of the City of Covington.

Section 33.

Board of Street Railway Commissioners—Appointment, Term of Office, Vacancies, Qualification, Hours of Business.—Immediately upon the taking effect of this ordinance there shall be designated a Board of Street Railway Commissioners. One member of said Board shall be appointed by the Mayor of the City, and two elected by the General Council, who shall assume the duties of their office at once. Of the members of the Board of Street Railway Commissioners first appointed hereunder, one shall hold office until February first next after this ordinance takes effect, one until the succeeding first day of February, one year thereafter, and one upon the second succeeding first day of February, two years thereafter. The terms of the first Commissioners first appointed hereunder shall be determined by lot immediately after their designation. The term of office of each Commissioner after the first Commissioners shall begin on July 1, succeeding their appointment. Upon the expiration of the terms of the first Commissioners appointed hereunder, the term of each succeeding Commissionr thereafter shall be for three years,
244 and he shall be appointed as herein designated. Vacancies shall be filled by appointment for the unexpired term.

2. Qualification.—No person shall be eligible or shall hold the office of Street Railway Commissioner or hold any office or position under the Board of Street Railway Commissioners, who holds any official relation to any common carrier, railroad corporation, street railroad corporation, gas corporation, or electrical corporation, or any other public utility company, or who owns stocks or bonds herein.

3. Hours of Business.—The office of the Board shall be open for business between the hours of eight o'clock in the morning and eleven o'clock at night, every day in the year, and one or more responsible persons, to be designated by the Board or by the Secretary under the direction of the Board, shall be on duty at all times and in immediate charge thereof.

4. Annual Report of the Board of Street Railway Commissioners.—

All proceedings of the Board of Street Railway Commissioners and all documents and records in its possession shall be public records and the Board shall make an annual report to the Council on or before the second Monday of each year, which shall contain copies of all orders issued by it, and any information in possession of the Board which shall be deemed of value to the Council and people of the City. Said report shall be printed and distributed as reports of the Mayor and other officials are printed and distributed.

245 5. Duties of Board.—The Board of Street Railway Commissioners shall act as the technical adviser of the Council of the City of Covington in all matters affecting the interpretation, meaning and obligation of any of the provisions of this ordinance, or other ordinances in reference to street railways, or sections thereunder affecting the quantity or quality of service or the cost thereof and the rate of fare, and as arbiter between the grantee and the City. It shall keep always informed as to all matters affecting the cost or quality or quantity of service furnished and the receipts and disbursements and property of the grantee and the rate of fare charged by the grantee.

6. Service of Notice. Office of Board.—Salary.—The highest officer of the grantee, or in his absence or disability, such persons as shall have been designated by the President, and notice thereof given to the City, and if no such designation has been made, the *the* highest executive officer of the grantee, in the order named the grantee's by-laws, a copy of which shall be furnished to the City, with all amendments from time to time made, in the City, at the time shall represent the grantee, and any notice, decision or order of the Board of Street Railway Commissioners served upon him shall be deemed service and notice to the grantee. The Board of Street Railway Commissioners shall be provided with a suitable room in the City Building, and office, furniture, stationery and supplies, or in the discretion of the General Council, the grantee shall furnish to said Board suitable room in connection with the general office of the grantee in the City of Covington. The members of the Board of Street

246 Railway Commissioners shall receive a salary at a rate to be fixed from time to time by Council, but not exceeding Two Thousand ($2,000) Dollars per year each, payable by the City, and the grantee shall, upon demand of the General Council, pay into the City Treasury the amount sufficient to defray the expenses of the Board, including the salaries of the Commissioners, for any ensuing year or part of year. The Board shall have the right to employ such assistants, accountants, engineers, clerks and other employees as it shall deem necessary to enable it at all times to inspect and audit all receipts, vouchers, disbursements, prices, pay-rolls, time-cards, papers, books, documents and property of the grantee, and the cost of all such persons so employed by the Board of Street Railway Commissioners at salaries fixed by them, shall be paid by the City out of the sum paid by the grantee into the City Treasury, upon the approval of the said Board of Street Railway Commissioners, provided that the aggregate amount thereof in any one month shall not exceed Two Hundred ($200.00) Dollars, and the sum so expended by the

Board of Street Railway Commissioners shall be subject to the approval of the Council. The Board of Street Railway Commissioners may require the assistance of any City Official.

7. Arbitration.—Whenever any difference shall arise with regard to any of the provisions of this ordinance, or any other ordinance not inconsistent herewith, or any order, regulation or requirement of the Board of Street Railway Commissioners, or of the rights of the grantee or City hereunder, between the grantee and the City, the same shall be submitted to the Board of Street Railway
247 Commissioners, and the Board shall notify both City and grantee of such submission, and the difference so submitted shall be decided within thirty days from the time of such submission, unless the Board unanimously agree to the extension of time. Should said question be not determined within said thirty days, and no such extension of time made, the Board must report to the General Council its reason for such failure, which reason shall be published in full in the official newspaper of the City of Covington, and the General Council may, in its discretion, grant the Board further time, or decide the question or difference itself.

Pending the said hearing or decision the grantee shall not be excused from obeying any ordinance, order or requirement of the General Council or the Board of Street Railway Commissioners, or any manner postpone the enforcement thereof, except as the Board may by unanimous order direct.

8. Trial of Complaint.—Complaint may be made to the Board of Railway Commissioners by any person or corporation aggrieved, by petition or complaint in writing, setting forth any thing or act done or omitted to be done by the grantee, in violation or claimed to be in violation of any provision of law or of the terms and conditions of this franchise or of any order of the Board of Street Railway Commissioners. Upon the presentation of such a complaint the Board shall cause a copy thereof to be forwarded to the grantee, accompanied by an order directed to the grantee requiring that the matter complained of be satisfied, or that the charges be answered within a time to be specified by the Board of Street Railway
248 Commissioners. If the grantee shall make reparation of any injury alleged and shall cease to permit or commit the violation of the law, franchise or order, or the act or omission complained of, charged in the complaint, and shall notify the Board of that fact before the time allowed for answer, the Board need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied and it shall appear to the Board that there are reasonable grounds therefor, it shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its power as the facts justify.

9. Powers of Board.—The Board of Street Railway Commissioners herein created shall have power to determine questions of every kind, character and description arising between the City and the grantee in the carrying out of the provisions of this ordinance or any subsequent ordinance passed by Council, or of any order or requirement of the Board, and the determination in writing of such Board of any

questions submitted shall be final and binding, except that when the determination of such Board be adverse to the City or favorable to the grantee, the finding shall be reviewed by the General Council.

Any order of the Board of Street Railway Commissioners subject to review by the General Council shall remain in force until final determination by the General Council.

Whenever the Board of Street Railway Commissioners or Council shall have considered and determined any question, copies of
249 such finding shall be forthwith filed with the grantee and the City and published in the official newspaper of the City. The Board of Council shall have the right, in any finding made by it, to fix the time within which the things required by it shall be done.

10. Power of Board of Street Railway Commissioners to Order Repairs or Changes—Extension, Betterments, and Permanent Improvements.—If, in the judgment of the Board of Street Railway Commissioners, repairs or improvements to, or changes in any tracks, switches, terminals or terminal facilities, motive power, or any other property or device used by the grantee in or in connection with the transportation of passengers, freight or property, ought reasonably to be made, or that any addition should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers, freight or property, or in order to furnish street railway service in any part of the town not provided or insufficiently provided with the same, or that any extensions, betterments or permanent improvements are necessary for the public convenience, the Board of Street Railway Commissioners shall, after a hearing as provided in Section 13, either upon its own motion or after complaint, make and serve an order directing such repairs improvements, changes, extensions or additions to be made, within a reasonable time and in such manner to be specified therein, and the grantee shall thereupon make all such repairs, improvements, changes and extensions and additions required of it by such order.

250 11. Power of Board of Street Railway Commissioners to Order Changes in Time Schedules and Running of Additional cars.—If, in the judgment of the Board of Street Railway Commissioners, the grantee does not furnish enough cars or does not operate sufficient motive power to accommodate traffic, passenger and freight, transported or offered for transportation to it, or does not run its cars with sufficient frequency, or at a reasonable or proper time, having regard for safety, or does not run any car or cars upon a reasonable time schedule for the run, the Board shall, after a hearing either upon its own motion or after complaint, have power to make an order directing the grantee to increase the number of its trains, or of its cars or increase its motive power, or to change the time for starting its cars or to change the time schedule for the running of any train or car or make any other suitable order that the Board may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation. The power conferred upon the Board of Street Rail-

way Commissioners by this contract shall extend to all lines which may lie partly or wholly within the limits of the City of Covington or any car or cars in operation whose trip may lie partly or wholly within the limits of this city as now or hereafter constituted. Nothing in this section shall be construed to exempt the grantee from the operation of Section 27 of this ordinance.

It is expressly stipulated that the grantee operate its cars over those streets mentioned in Section 2, and now used by what is known as the Latonia Line, to and from its terminus in the
251 City of Cincinnati, so that passengers may be transported at all times to and from the said terminus without change of cars, and further that said line be extended North on Latonia Avenue to the Madison Pike, thence on same to its junction with the present right of way of the Street Railway Company.

12. Reports to be Furnished by Grantee.—At all times during the continuance of the rights herein granted or any renewal hereof, the grantee shall keep in its office in the City of Covington, open to inspection at all reasonable times, full, true and accurate accounts of all moneys expended and liabilities incurred in connection with its business and the maintenance and operation of its property, and also complete statistical accounts of its business and operations. The said grantee shall make and furnish to the Board of Street Railway Commissioners monthly statements and reports of its car mileage and earnings, and such other statements and reports as the said Board may from time to time direct, and said Board shall at all times have access to and full authority to inspect, examine, audit and verify all accounts, vouchers, documents, books and papers of grantee, relating to the receipt and expenditure of money in the business done by it in the operation of its railway system.

13. Removal of Commissioners.—Any Commissioner may be removed for inefficiency, neglect of duty or misconduct in office. A copy of the charges shall be given him and an opportunity to be publicly heard in person or by counsel in his own defense,
252 upon not less than ten days' notice. The County Judge, one member selected by the General Council from among its number and the Mayor shall constitute a trial board, and in the event any such person shall fail or refuse to act or in the event that Council should fail to act as herein set out, the other two members shall appoint a third member, and if the Mayor or County Judge fail or refuse to act, Council shall elect three members from among its number to sit as a trial court.

14. Investigation of Accidents.—The Board of Street Railway Commissioners shall investigate the cause of all accidents which result in loss of life or injury to persons or property and which, in its judgment, shall require investigation. The Grantee shall give immediate notice to the Board of Street Railway Commissioners of every accident happening upon any line owned, operated, controlled or leased by it.

15. Penalties.—Violation by Grantee.—The grantee and all its officers, agents and employees shall obey and comply with every order made by the Board of Street Railway Commissioners under

authority of this franchise, as long as the same shall be and remain in force. If the grantee shall violate any provision of this ordinance, or shall fail, or neglect to obey, observe and comply with any order, direction or requirement of the Board of Street Railway Commissioners, it shall forfeit to the City of Covington such sum not to exceed Five Thousand Dollars ($5,000) for each and every offense, as Council may provide, or it shall forfeit its franchise and bond as provided in Section 3, or be subject to such penalty as may be
253 provided by Council, recoverable in the Police Court. Every violation of any such order or direction or requirement of this ordinance, shall be a separate and distinct offense, and in case of a continued violation, every day's violation thereof shall be deemed a separate and distinct offense.

16. Same.—Officers, Agents, Employees.—Every officer, agent or employee of the grantee who shall violate or who procures, aids or abets any such violation by the grantee of any provision of this contract or order or ordinance or Council, or requirement of the Board of Street Railway Commissioners, made pursuant to the same, or who shall fail to obey, observe and comply with the same, or who procures, aids or abets the grantee in its failing to obey, observe, and comply with any order or provision, shall be deemed guilty of a misdemeanor and upon conviction in the Police Court of the City of Covington, shall be fined not less than $10.00 nor more than $50.00, for each offense, and in the event of a continued violation, each day's violation shall be construed a separate offense.

17. The grantee, by accepting this franchise, hereby specifically agrees to and accepts each and every condition of the same, and specifically waives its right to litigate in any court of law any matter the regulation of which is otherwise provided for in this ordinance, and it further specifically agrees and consents to every power and authority or right hereby retained by the City or conferred upon the Board of Street Railway Commissioners, and consents to the exercise of such power, or authority or right so retained or
254 conferred by this contract under penalties of forfeiture or fine as herein set out.

18. If, at any time, the provisions of this ordinance for the creation of a Board of Street Railway Commissioners, shall be held invalid, or if at any time there shall be no Street Railway Commissioners, the powers, duties and rights herein conferred in said Board, shall devolve upon and be exercised by the General Council.

Section 35.

The words "City of Covington" and "City Limits" shall be construed to mean and include the limits of the City as now or hereafter constituted.

The term "grantee" shall be construed to mean the grantee, its successors, and assigns.

The term "General Council," "Council," "Board of Council," shall be construed to mean the legislative body of the City.

Section 36.

All ordinances and parts of ordinances in conflict herewith, to the extent of such conflict are hereby repealed.

Section 37.

This ordinance shall take effect and be in force from and after its passage and approval by the Mayor, and acceptance by the grantee.

Passed by the Board of Councilmen June 17, 1913. Passed by the Board of Alderman, June 24, 1913. Approved by the Mayor July 14, 1913.

255 EXHIBIT "E."

Filed November 17, 1915.

Pleas before the Hon. Kenton Circuit Court, at Covington, Kentucky, on the 20th Day of March, 1909, Criminal, Common Law and Equity Division.

Hon. Wm. McD. Shaw, Judge.

FRANK WOODALL, Plaintiff,

v.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Defendant.

Be it remembered that on the 24th day of July, 1908, the plaintiff filed his petition herein, which is as follows:

The plaintiff, Frank Woodall, says that he is and was at all times mentioned herein a citizen of the City of Covington, Kentucky, and a tax payer thereto; that the defendant, The South Covington & Cincinnati Street Railway Company, is and was at all times a corporation incorporated under the laws of the Commonwealth of Kentucky, and engaged in the business of operating a system of electric car lines over and upon certain streets and other public ways in the City of Covington, Kentucky.

Plaintiff says that Market Street or Park Place is a public street in the City of Covington maintained as such by said City by taxation; that said defendant is now and has been for several years next last past operating and maintaining its tracks, poles, wires,
256 etc., over and upon said Market Street or Park Place in the said City from Scott Street on the West to Greenup Street on the East; that said defendant has no right authority or franchise to so use or occupy said street or any part thereof; that the City Council of the City of Covington passed an ordinance entitled "An Ordinance of the City of Covington, authorizing the South Covington & Cincinnati Street Railway Company to change its tracks from certain streets to certain other streets in the City of Covington,"

which was approved July 11, 1901, by which it was sought to confer upon said defendant the right to use said Park Place for street car purposes.

A certified copy of said ordinance is filed herewith and made part hereof, marked Exhibit "A."

Plaintiff says that said ordinance is illegal and void because the said ordinance constitutes an attempt upon the part of the General Council of the City of Covington to grant, and an attempt upon the part of said defendant to obtain privately a franchise without advertisement or receiving bids therefor publicly; that said franchise was not offered for sale, and no bids were publicly or otherwise received for same and that said proceedings is entirely illegal and void because it is in violation of Section 164 of the Constitution of the Commonwealth of Kentucky; that said ordinance constitutes the only claim of said defendant the right to use and occupy said street.

Wherefore plaintiff prays that it be adjudged that defendant has no right or authority to use said street, or any part thereof for its poles, wires, tracks, etc., and that said defendant has no
257 right to operate street cars over or upon said Street or any part thereof; that said defendant be required by mandatory injunction to remove its tracks, poles, wires, etc., from said street for his costs herein, and for all proper relief.

WALKER C. HALL.

The plaintiff, Frank F. Woodall, says that the statements of the foregoing petition are true as he believes.

F. F. WOODALL.

Subscribed and sworn to before me by Frank F. Woodall this 24th day of July, 1908.

FRANK A. DROEGE, *Clerk*,
By CAMPBELL ELLIS, *D. C.*

And thereupon on the same day summons issued herein, which is as follows:

THE COMMONWEALTH OF KENTUCKY:

To the Sheriff of Kenton County:

You are commanded to summon The South Covington & Cincinnati Street Railway Company to answer in twenty days after the service hereof, a petition in ordinary, in suit numbered 10653, filed against it in the Kenton Circuit Court at Covington, by Frank F. Woodall and warn its officers that upon failing to answer, the said petition will be taken for confessed, or it will be proceeded against for contempt.

Witness, the Clerk of said Court, this 24th day of July, 1908.

FRANK A. DROEGE, *Clerk*,
By CAMPBELL ELLIS, *D. C.*

258 Said Summons was returned by the Sheriff as follows:

"Executed the within summons by delivering to James C. Ernst,

President of the South Covington and Cincinnati Street Railway Company, a true copy hereof, July 27, 1908."

GEO. H. DAVISON, *Sheriff*,
By JOHN O'MEARA, *D. S.*

At a sitting of the Court on September 25, 1908, the following order was entered:

Order.

The plaintiff filed in the Clerk's Office, motion for judgment. Said Motion is as follows:

Motion.

Plaintiff moves for judgment.

WALKER C. HALL,
Att'y for Plaintiff.

At a sitting of the Court of October 5, 1908, the following order was entered.

Order.

The motion for judgment is continued.

At a sitting of the Court on October 19, 1908, the following order was entered herein.

Order.

The plaintiff's motion for judgment is withdrawn.

The defendant enters a demurrer to the petition, and same is submitted on briefs October 28, 1908.
Said General Demurrer to the petition is as follows:

Now comes the defendant and demurs to the petition of
259 the plaintiff herein, on the ground that it does not state facts sufficient to constitute a cause of action.

ERNST & CASSATT,
Attorneys for Defendant.

At a sitting of the Court, October 26, 1908, the following order was entered.

Order.

This cause is submitted on briefs, October 28, 1908, on the demurrer to petition.

At a sitting of the Court, November 11, 1908, the following order was entered.

Order.

The submission herein is set aside for plaintiff's brief.

At a sitting of the Court November 19, 1908, the following order was entered.

The plaintiff filed in the Clerk's office, motion to submit on demurrer to petition.

Said motion is as follows:

Motion.

Plaintiff moves to submit on demurrer to petition.

At a sitting of the court on November 23, 1908, the following order was entered herein.

Order.

The motion to submit on demurrer to petition is continued.

At a sitting of the Court November 30, 1908, the following order was entered.

Order.

The plaintiff's motion to submit on demurrer to petition
260 is submitted on briefs December 7, 1908.

At a sitting of the Court December 7, 1908, the following order was entered.

Order.

The defendant filed in the Clerk's Office reply brief.

At a sitting of the Court March 17, 1909, the following order was entered herein.

Order.

The Court files an opinion.

The demurrer of the defendant to plaintiff's petition is sustained, the plaintiff excepts, etc., etc.

At a sitting of the Court March 20, 1909, the following order was entered herein.

Order.

The plaintiff filed in open court ordinance of July 11th, 1901, as Exhibit "A" with petition, said exhibit having been lost.

Order.

The plaintiff declines to plead further and the petition is dismissed, to which the plaintiff objects and excepts and prays an appeal to the Court of Appeals which is granted.

Said ordinance referred to in the above order is as follows.

An Ordinance of the City of Covington Authorizing The South Covington and Cincinnati Street Railway Company to Change Its Tracks From Certain Streets to Certain Other Streets in the City of Covington.

Be it ordained by the General Council of the City of Cov-
261 ington, That,

Whereas, The South Covington and Cincinnati Street Railway Company now occupies a portion of Second Street, between Scott and Greenup Streets, and Greenup Street between Second Street and Park Place, and Scott Street, between Second Street and Park Place, and operates thereon a street railway, its tracks on said streets connecting the tracks upon the Suspension Bridge with the various routes operated by said South Covington and Cincinnati Street Railway Company; and

Whereas, The City of Covington has requested that the said street railway company shall change its tracks and the operation of the street railway from said portion of said streets to Court Street and Park Place, all as more fully set forth herein; and

Whereas, Said City of Covington desires to widen Court Street on the east side thereof, between Third Street and Park Place, and the said South Covington and Cincinnati Street Railway Company is willing to give to said City a strip of land twelve feet along said side of Court Street, between Third Street and Park Place, from land owned by said South Covington and Cincinnati Street Railway Company; and

Whereas, In the opinion of the Council, the said change of tracks from the street first above specified to Court Street and Park Place will be for the benefit of said City and the convenience of its citizens and of the traveling public now, therefore,

Be it ordained by the General Council of the City of Cov-
ington:

262 Sec. 778 (#1). That the South Covington and Cincinnati Street Railway Company is hereby granted the right of way and authorized and empowered to lay double tracks, and to construct, operate and maintain its street railway from the tracks on the Suspension Bridge, over and across Second Street, at the necessary angle, to the Center of Court Street, thence along and over the center of Court Street to Third Street, and across Third Street and over Court Street, as widened, as hereinafter set forth, to Park Place, on a straight line with its tracks on Court Street, between Second and Third Streets, and single or double tracks over and upon Park Place,

between Scott and Greenup streets; and said South Covington and Cincinnati Street Railway is hereby authorized and granted the right of way to lay such curves, frogs, switches and cross-overs as are necessary and proper, in its judgment to connect said Suspension Bridge tracks with the track or tracks on Third Street, with the track or tracks on Park Place; also to connect its track or tracks on Park Place with its tracks on Scott Street and Greenup Street, and such other curves, frogs, switches, cross-overs and other rails or appliances as may be necessary and proper, in its judgment, to the full use and enjoyment of the rights herein granted; also to erect the poles and string the wires on and over said streets, which may be necessary or advantageous to the use of said right of way and to the operation of said street railway, as herein above set forth.

Sec. 779 (#2). The said South Covington and Cincinnati Street Railway Company is to commence the work of laying said
263 tracks within a period of four (4) months from the date hereof, unless prevented therefrom by the said City of Covington, or by delay in the improvement of said Court Street and Park Place, and said Company further agrees, within a reasonable time after the completion and operation of its tracks as above set forth, to remove its present tracks on Greenup Street, between Park Place and Second Street, on Second Street between Greenup streets and the Suspension Bridge, also on Second Street, between the Suspension Bridge and Scott Street, also on Scott Street, between Second and Park Place, and on Third Street, between Court Street and Greenup Street; and said streets shall be put by said company in as good condition and order as they now are under the direction of the City Engineer of the City of Covington.

Sec. 780 (3). It is hereby ordained and agreed on the part of the City of Covington that the right of way over said streets from which the tracks are to be removed, as herein set forth, and the right to construct, operate and maintain a street railway, or to lay its tracks thereon, or to construct, operate and maintain any other system of passenger traffic on and over said streets, shall not at any time hereafter be granted to any other person or corporation than the South Covington and Cincinnati Street Railway Company. In the event that the said City of Covington shall hereafter attempt to authorize any other person or corporation to occupy and use said streets, or any part thereof, from which the tracks are to be removed, for street railway purposes, or for the construction and maintenance of
264 any system of passenger traffic, then the South Covington and Cincinnati Street Railway Company shall have and regain the same rights to use said streets that it now possesses under existing laws and ordinances. In the event that for any reason the rights herein granted to said South Covington and Cincinnati Street Railway Company in the first section hereof shall be taken from said, The South Covington and Cincinnati Street Railway Company, or said Company shall be prevented in any manner from exercising said rights, or in the event that said Company shall fail for any reason to effectually obtain said rights, it shall retain and possess in every respect the rights which it now has over and upon the streets

mentioned in section two (2) hereof, and the land conveyed by it to said City, as set forth in the next section hereof, shall immediately revert to it, The South Covington and Cincinnati Street Railway Company.

Sec. 781. (#4) The rights herein granted to said street railway company are granted in consideration of the benefits to the City of Covington, as hereinabove set forth and otherwise, and in consideration of the conveyance by the said South Covington and Cincinnati Street Railway Company of a strip of land on the east side of Court Street, between Third Street and Park Place, fronting one hundred (100) feet on Court Street, and being twelve (12) feet in depth, which shall be dedicated and deeded to the City of Covington for said street purposes for the widening of Court Street after the passage of this ordinance, said land to revert to said South Covington & Cincinnati Street Railway Company upon the condition set forth in the preceding section hereof.

265 Sec. 782 (#5). The rights and obligations of said City of Covington and the South Covington and Cincinnati Street Railway Company shall be the same as to the streets mentioned in section one (1) as they now are with reference to the streets mentioned in section two (2) hereof under the Laws and Ordinance now in force relating thereto.

Sec. 783 (#6). The said South Covington & Cincinnati Street Railway Company shall accept this ordinance in writing within thirty (30) days from its passage.

Passed by the Board of Council, July 1, 1901.

Passed by the Board of Aldermen, June 20, 1901.

Approved by the Mayor, July 11, 1901.

COMMONWEALTH OF KENTUCKY,
Office of the City Clerk:

I, H. G. Klostermann, City Clerk of the City of Covington, Kentucky, do hereby certify that the foregoing writing is a true and exact copy of the original record on file in my office.

In witness whereof, I have hereunto set my hand and affixed the official seal of the City this 20th day of March 1909.

H. G. KLOSTERMANN,
City Clerk,
By RICHARD T. VON HORNE,
Deputy C. C'k.

STATE OF KENTUCKY,
Kenton Circuit Court:

I, Frank Droege, Clerk of said Court, certify that the foregoing is a true and complete copy and transcript of the record of the
266 cause named in the caption, as fully as the same appears from the record thereof on file in my said office.

Witness my hand, this March 20th, 1909.

FRANK A. DROEGE, *Clerk,*
By CAMPBELL ELLIS, *D. C*

Fee, $3.25.

267 *Deposition of W. H. Harton, Taken on Behalf of the Plaintiff.*

Filed November 17th, 1915.

The United States District Court, Eastern District of the Plaintiff.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

The deposition of W. H. Harton taken by consent and agreement of the parties hereto, Thursday, May 20th 1915, at two o'clock P. M. before Allan Smith, a Notary Public in and for Hamilton County, Ohio, at the office of Ernst, Cassatt & Cottle, Nos. 1612-1614 First National Bank Building, in Cincinnati, Ohio, to be read as evidence in the above styled cause.

It is stipulated by and between the parties hereto that said deposition may be taken in shorthand and afterward transcribed and submitted to the witness, and when signed by him, said transcript may be used as the deposition of the witness in the case.

The witness W. H. HARTON, having been first duly sworn, testified as follows:

Direct examination by A. C. Cassatt, for the Plaintiff.

1. State your name and residence?

268 A. W. H. Harton I live at 309 Washington Avenue, Newport, Kentucky.

2. Do you occupy any position with the South Covington & Cincinnati Street Railway Company, the Plaintiff?

A. Yes sir.

3. What is it?

A. Superintendent of tracks and buildings.

4. How long have you been connected with the South Covington & Cincinnati Street Railway Company?

A. I took service with the South Covington & Cincinnati Street Railway Company in the Fall of 1892.

5. In what capacity?

A. I started in as rodman in the engineering corps.

6. What has been your connection since that time,—state in a general way what your positions have been?

A. Then I branched out into assistant engineer of tracks, and after the road was constructed, I went into the general offices, as Chief Clerk to Superintendent Jenkins, and purchasing agent, and shortly after that I took charge of the outside track work, and have had charge of it ever since; that was in 1898.

7. Has your work in those various positions included the portion

of the South Covington & Cincinnati Street Railway that lies within the City of Covington?

A. Yes sir; the building of that line, was under the direction of Mr. Kimball; at that time I was in his engineering force.

8. Are you familiar with the Ordinance of the City of Covington of October 7th 1892, which is known roughly as the *the*
269 "Compromise Ordinance"?

A. Yes sir.

9. Are you familiar with the provisions of that Ordinance relative to the change of tracks from certain Streets named in that Ordinance to other streets therein named?

A. Yes sir.

9. Are you familiar with the provisions of that Ordinance relative to the change of tracks from certain streets named in that Ordinance to other streets therein named?

A. Yes sir.

10. Were all the changes called for by that Ordinance made by the South Covington & Cincinnati Street Railway Company?

A. As far as the track work, yes sir.

11. What do you mean by so far as the track work?

A. I mean the changes of the track from one street to another—to discontinue using one street for track work and change it to other streets.

12. Are there any changes called for by that Ordinance that were not made?

A. Not that I know of; no changes.

13. Well you would know if there were any?

A. Yes sir; the only thing of that kind,—the only thing I meant was the financial end of it in the Ordinance; that, I know nothing about.

14. I am talking about the change of tracks?

A. No; no change of tracks.

15. About what was the mileage of the South Covington & Cincinnati Street Railway Company in Covington prior to the adoption and carrying out of the Ordinance of 1892 referred to?

270 A. About 15 miles.

16. After the provisions of that Ordinance were carried out, what mileage did the Company have as a result of those changes?

A. 11-4/10.

17. Now what was the character of the changes made,—were there any new routes established?

A. No new routes were established; just the extension of two lines were made.

18. How about modifications of existing routes?

A. Modification just by extending the Austinburg line, and also, what was called the Third Street Line.

19. What proportion of the 11 miles which you have said the road had after that Ordinance was carried into effect, was new mileage?

A. A very small proportion.

20. The difference between the 15 miles, which you had prior

to that Ordinance, and the 11 odd miles you had after that Ordinance, was streets that they gave up, was it not?

A. Yes sir.

21. Can you state in a general way what it cost the Company to make the changes in tracks required by that Ordinance?

A. Not less than $250,000.00.

22. Please state, in a general way, or as nearly as you can, what amount has been expended by the Company since that original expenditure in re-laying or maintaining said tracks?

271 A. $225,000.00 is the amount of money that I have spent in reconstructing tracks under that South Covington Ordinance.

23. What is the mileage in the City of Covington of the South Covington franchises?

A. It is 11-4/10 miles, the South Covington franchises in the City of Covington.

24. The same?

A. The same as I have stated before.

25. Was the South Covington & Cincinnati Street Railway Company engaged in the operation of street cars in the City of Covington, when you went into the employ of the road in 1892?

A. Yes sir.

26. Has it been so engaged continuously ever since?

A. Ever since.

27. And is now?

A. And is now.

27½. Are you familiar with the Ordinance, what is known as the Court Avenue Ordinance of July 11, 1901, of the City of Covington, providing for a change of tracks from Greenup, Second & Scott Streets to Park Place and Court Avenue?

A. Yes sir.

28. Did the Company make the changes of track and route required by that Ordinance?

A. Yes sir.

29. You had charge of that, yourself, didn't you?

A. I had charge of the work, yes sir.

30. Did the Company turn over to the City of Covington the strip of land for the widening of Court Avenue provided for in that ordinance?

272 A. Yes sir; and it is now used for street purposes.

31. Do you know whether any deed was made by the Company to the City?

A. Yes sir.

32. What, if anything, has the City of Covington had to do with the location upon the various streets of the tracks of the South Covington & Cincinnati Street Railway Company, making up that 11 miles of track to which you have referred?

A. The work was all done under the supervision of the City Engineer; he set the grade stakes, also the line stakes, for the position of the tracks in the streets; that is, he doesn't set the line stakes, but

he gives us information where to put them in, and sometimes, we will work it between squares, from points indicated by him.

33. Has it been the habit of the City Engineers to inspect the progress of your work from time to time?

A. Yes sir; and we always have an inspector on the job; the City always has an inspector on the work; we do that in conjunction with them, whenever they reconstruct the streets, they always have an inspector, and he is out on the work, off and on, all the time.

34. Has that been true ever since you have been with the Company?

A. Ever since I have been with the Company, yes sir.

35. And does that apply to all the track laying to which you have referred in your evidence?

A. Yes sir.

36. Have you examined Council Ordinance No. 9069 passed
273 by the Board of Council, June 17th 1913, approved by the Mayor, July 14, 1913, and referred to in the bill in this case?

A. Yes sir.

37. I call your attention to the streets named in Section 2 of that Ordinance, and I will ask you to state how far that list of streets, or of routes corresponds with the streets or routes now occupied and operated by the South Covington & Cincinnati Street Railway Company?

A. They are all of them occupied by tracks, except on Western Avenue from Second to Montague, and also, in Devou Park, there are no tracks in Devou Park.

38. With that exception state whether the streets set forth in Section 2, describe exactly the streets and portions of streets upon which the South Covington & Cincinnati Street Railway Company is now operating its system?

A. They are exactly the streets and parts of streets on which we now operate.

39. Does your company operate over any other streets or parts of streets in the City of Covington than those named in Section 2 of that Ordinance?

A. No sir.

40. What is the distance from Second to Montague Streets on Western Avenue?

A. About 2000 feet.

41. Are there any tracks on Western Avenue at this time between those streets?

A. No sir.

42. There are no tracks on Western Avenue at all?

A. No sir; not a piece of track on Western Avenue.

274 43. State in a general way, what is the width of the streets of the City of Covington named in Section 2 of that Ordinance?

A. They vary anywhere from,——

44. I mean the width between curbs?

A. They vary anywhere from 26 feet to 40 feet, between curbs, with the exception of Park Place, and that runs 79.

45. How wide is Court Avenue between curbs, and for what distance?

A. Court Avenue between Second and Third runs 40 feet between curbs, and between Third and Park Place, it runs 56 feet; that's where we widened it.

46. What is the distance from Third Street to Park Place?

A. It is about 160 feet.

47. What is the width of Park Place?

A. Park Place is 79½ feet between curbs; and the center of that street is occupied now by a park.

48. What is the width of Park Place as used for street purposes?

A. 20 feet on each side of the Park.

49. What is the length of Park Place?

A. It is about 500 feet.

50. Was the Park in Park Place in existence at the *the* time of the passage of the Ordinance approved July 14, 1913?

A. No sir.

51. Can you state how much of the 11 miles of mileage in Covington is double track?

A. Practically about 8 miles.

52. What is the maximum width of the streets upon which
275 those double tracks are laid?

A. The maximum width is the 79 feet on Park Place, for that short square, between Court and Greenup, and on Court Avenue, between Third and Park Place, it is 56 feet wide; in other places all throughout the town, the maximum width is 40 feet.

53. Are there any of the streets upon which your double tracks are laid, where the width is less than 40 feet between urbs?

A. Yes sir.

54. Is it a substantial distance?

A. We operate on some streets with a distance between curbs of 33 feet, with a double track.

55. How about the single track road, state in a general way, the width of the streets over which you operate single track?

A. The majority of those streets run about 27 feet between curbs.

56. What is the gauge of your street railway tracks in the City of Covington?

A. Five feet, 2½ inches between gauge lines.

57. What do you mean by "between gauge lines"?

A. That's the point on the rail, where the flange of the wheel comes in contact with it.

58. That would be inside edge of each rail?

A. Not necessarily; because there's a guard on the inner side of the flange; it is a grooved rail, and it has a guard on the inside of that to protect the paving.

276 59. Is that the uniform gauge of all street railway tracks in Cincinnati, Covington, Newport and surrounding villages?

A. Yes sir.

60. And on the bridges crossing the Ohio River?

A. Yes sir.

61. How far in the ordinary and workmanlike construction of such tracks, do the ties project beyond the rails?

A. About 14 inches.

62. How far do the cars overhang?

A. 18 inches.

63. On each side?

A. On each side.

64. Where your double tracks are laid, what is the distance between the outer rails of the two tracks?

A. 14 foot and 11 inches.

65. Could it be less than that distance with a safe operation of the cars?

A. No sir.

66. What is the usual and workmanlike way of laying or constructing the sub-surface of the street railway tracks?

A. The usual way is to spike your rail to the tie,—to the 8 foot tie,—that's the one we use,—and that's surfaced on either concrete or macadam, and the balance is filled up to the top of the street even, with brick paving or macadam, which ever the street may be constructed with.

67. What sort of trolley is used by your road in Covington?

A. We use the single trolley system in Covington, overhead.

277 68. Is that true also in Newport?

A. Yes sir.

69. And in all of your Kentucky territory?

A. All Kentucky territory we operate overhead, single trolley system.

70. What trolley system is in use in Cincinnati, over the lines, over which you operate in Cincinnati?

A. Double trolley system-overhead.

71. How are those trolley wires put up?

A. The standard construction is to set either iron or wooden poles at the curb line, and suspension wires are attached to both poles, and the bare copper wire is then attached to this suspension wire.

72. How far apart are those poles erected?

A. They average from 80 to 100 feet, except in the curves, and then sometimes they are a little closer.

73. How are the feed wires carried?

A. Carried on cross arms attached to the poles, and the current is then transmitted to the trolley wire, by a small wire, running from pole to pole, and insulated from it.

74. State whether the system of trolley wires in the City of Covington has been erected and maintained with the consent of the City, and under the supervision of the City Engineer, or other City officials?

A. Yes sir.

75. The same condition exists that you stated with reference to the tracks?

A. Yes sir, he as a rule, designates, the points where we put
278 the poles.

76. Who does?

A. The City Engineer, or Superintendent of Public Works.

77. State whether it would be practicable to operate another street railway system over the streets occupied by you in the City of Covington, considering the width of the streets, the trolley wire system, and any other practical matters that occur to you,— state fully what your conclusion is?

A. I don't think so. It would be very impractical to operate another street railway on the streets which we occupy, for the simple reason, that, if they didn't come to some conclusion with us in operating over our present tracks, especially in cases where they had to operate over the tracks in the streets of the ordinary width of streets in Covington, and if new tracks were put in, it would be practically impossible for vehicle traffic to take place, and then, whenever we would hit an intersection where curve work or special work was required, it would be a jumble.

78. How would that affect your operation at those points?

A. It would practically put it out of business.

79. Are there any of the streets upon which you now operate and which are named in Section 2, upon which it would be impossible to lay and operate additional tracks?

A. There's quite a few of them.

80. Can you name some of them?

279 A. Well, Third Street from Main west; Crescent Avenue from Second to Third; Second Street from Crescent Avenue to the Corporation line; that's about all that I can recall at the present time.

81. On what part of the streets are your tracks in Covington laid?

A. As a rule they are laid in the center of the street, with one or two exceptions.

82. How much of the total mileage is not laid in the center of the streets?

A. Very little; it is only a matter of about three squares, where it is not in the center of the street.

83. Whether single or double track?

A. Whether single or double track; it happens in both of those cases to be single track.

84. Well then as to the rest of your mileage in Covington, your track, whether single or double, occupies the center of the street?

A. Yes sir.

85. What would be the result of attempting to maintain another overhead trolley system in the City of Covington on the streets now occupied by your tracks?

A. There would be just practically double the number of poles that are on the streets at the present time, and whenever we hit an intersection, where there was any curve work, the two lines would necessarily have to come in contact, and there might be a good deal of trouble in reference to the difference in voltage of the two com-

panies, which would make very intricate work, and it would
280 be hard work to maintain.

86. I believe you stated that at the curves and intersections in the streets of Covington, it would be impossible to lay and operate additional tracks?

A. Yes sir, I did say that.

Cross-examination by Frederick W. Schmitz, for the defendant.

1. When you speak of the system within the City of Covington, do you mean the City of Covington, according to its present corporation line?

A. I spoke of the system of trackage there,—that trackage that was absolutely controlled by the South Covington & Cincinnati Street Railway Company.

2. Are there any street car tracks in the City of Covington, as it is now constituted, including the City of Latonia, that are not absolutely controlled by the South Covington & Cincinnati Street Railway Company?

A. My understanding of that is, that that's controlled by the Covington & Latonia Railroad, and the Cincinnati, Covington & Rosedale.

3. What portion of the street car tracks now in the City of Covington, are not control-ed by the South Covington & Cincinnati Street Railway Company, in the sense in which you mean
281 it, state where they are located and upon what streets?

A. What I had reference to there was the tracks that are owned by the Cincinnati, Covington & Rosedale, and that constitutes the tracks on Twelfth Street from the Licking River Bridge to Greenup,—on Eleventh from Greenup to Russell—on Russell from Robins to Thirteenth, and on Thirteenth from Russell to Holman, and on Holman Street from Twelfth out around the loop in Central Covington, and on Robins Street between Russell and Madison Avenue; also the track on Twelfth Street from Holman to Hermes Avenue, and on Hermes Avenue from Twelfth to Pike, and on Pike Street from Montague to Main, and also, Montague Street from Western, or Pike Street, to the corporation line; that constitutes the Cincinnati, Covington & Rosedale in the City of Covington. The *the* Covington & Latonia, and Cincinati, Covington & Rosedale operate from the old corporation line of Covington, on Madison Pike, to a private right of way, leaving the Pike at the left, near a point that is called Anderson's Hill, around through a private right of way to Cherry Street, or Kruse Avenue, I believe it is called now, on Kruse Avenue to Main Street, on Main Street from Kruse Avenue to Southern Avenue; on Southern Avenue from Main Street to Huntington Avenue, on Huntington Avenue to Fairview Avenue, on Hamlin Street from Main Street to Eugenia, and on Eugenia from Hamlin Street to the extension of Sandford and on Sandford from Eugenia to Carlisle, and on Carlisle to a private property line and on Latonia

Avenue, from about the race track to Sandford. That covers
282 the extent of the Covington & Latonia, and the Cincinnati, Covington and Rosedale.

4. Now, those lines that you have just now specified, they were not in existence in 1892, were they?

A. They were shortly, from the beginning of 1892, or shortly in 1893. They started with the work on them in 1893, in the spring of 1893, they were doing construction work on those lines.

5. And that work of extension, before all those lines were completed, took until then?

A. You mean in the completion of the work?

6. Yes sir?

A. We completed them in 1894; they were started in, I think, the Spring of 1892.

7. Did you have the Ft. Mitchell line completed at that time?

A. No sir; the Ft. Mitchell line was constructed in 1902.

8. Well, that line is the line which runs out Twelfth to Hermes and then to Pike, and out Pike to Montague etc., does it not?

A. Yes sir; that is, it operates over those tracks.

9. That is what is known as the Ft. Mitchell line?

A. Yes sir.

10. And then it comes in Pike Street to Main?

A. Yes sir; to Main.

11. When did you complete the Rosedale and the Latonia lines?

283 A. Completed them, I said, in the Spring of 1894.

12. Now, did your testimony with reference to conditions and the effect of this Ordinance have application to all of these lines?

A. At the beginning of my testimony, it was in reference to the tracks that were then owned by the South Covington & Cincinnati Street Railway Company.

13. Does that mean the 11-4/10 miles of track that you have been mentioning?

A. Yes sir.

14. Then the lines specified in the last two or three answers are not included in that mileage?

A. No sir.

15. Prior to the enactment of the Ordinance of 1892, you said the number of miles under control of the South Covington & Cincinnati Street Railway Company was 15, or about 15 miles, was there any additional trackage used by them?

A. Prior to 1892?

16. Yes sir?

A. Yes sir.

17. Where was it located, and about how much?

A. Well we had trackage on Scott Street from Fourth to State; we had trackage on Fifteenth Street from Greenup to Banklick; we had trackage on Banklick from Fifteenth to Pike; we had trackage on Cooper Street, which is now Pike Street, from Scott to Madison, and we had trackage on Seventeenth Street from Greenup to Scott,

if I can refer to my notes, I think I have covered it all, then
284 we also had trackage from Eastern Avenue to Greenup on Seventeenth.

18. And when you said that after the enactment of that Ordinance, there was 11-4/10 miles of track, did you mean by that that so much of the original 15 miles was still maintained?

A. There was 11-4/10 miles of the original 15 that was still maintained.

19. And that difference was replaced by trackage on other streets, is that it?

A. No, we actually did away with that much trackage, the operation of that much trackage, by that amount; the old trackage was in excess, after we begun operating under the 1892 Ordinance, by almost 4 miles: in fact; before 1892 we operated more mileage than we did after 1892.

20. Were you able to do that because of the change to electrical motive power?

A. It was done on account of the Ordinance requiring us to make those changes on those streets, and give up these other streets; they thought, the City people, I suppose, thought that it would serve the people to a better extent.

21. As a matter of fact, weren't you able after electrifying the system, to serve the people just as well and better after the change, than you did before?

A. Oh; yes sir.

22. You said the change cost $250,000.00?

A. Yes sir.

23. That is your estimate?

A. That's my estimate.

24. Upon what do you base that statement?

285 A. On the cost per foot of track, taking the number of feet of track laid.

25. Then you spoke of $225,000.00 expended for reconstruction, did you mean that that was an expenditure outside of the $250,000.00?

A. Yes sir; it has cost us that much to relay our tracks since 1892.

26. That is to maintain your system since that time?

A. Yes sir.

27. That is practically a running expense?

A. Well, sometimes we have to reconstruct on streets where the tracks are worn out, but that is due to the fact of the City requiring us to re-lay our tracks; at times we have to reconstruct on streets where the tracks are worn out.

28. In other words, reconstruction would pretty near explain the expenditure?

A. Reconstruction of the work originally put in.

29. And that reconstruction includes repairs?

A. No sir; that is not included in reconstruction; we have other charges on those lines which were a maintenance charge; that never went into it.

Mr. Cassatt:

30. That don't go into that $225,000.00 you mean?
A. No sir; it don't go into that $225,000.00.

Mr. Schmitz:

31. Then you mean after you installed, after you made those changes by the expenditure of $250,000.00 you then again changed it by reconstruction, and spent $225,000.00 more?
286 A. Yes sir.
32. What was the idea?
A. Well, the tracks had worn out, some of them, in some places, and the City required us to re-lay them on streets where they wanted to reconstruct the streets, where they wanted a different character of construction done; for instance, on a macadam street, if they wanted to lay brick, or asphalt, they required us to reconstruct our tracks by laying new work, and new ties and concrete material underneath.
33. That would usually be ordered when the street would get in bad repair, and they wanted to rebuild it, isn't that right?
A. Yes sir; and still at the same time, our tracks might be in such shape that we would have some five or ten more years' use of them.
34. You are not prepared to say now just what the actual facts were about that, with reference to the changes that were made?
A. In which way is that?
35. As to the condition of your track foundations where changes were ordered?
A. Yes, I would testify to that, because I happened to be on it, and I can enumerate some instances where tracks were not necessary to be reconstructed on account of the present condition of the tracks being good enough before.
36. But the City otherwise required a reconstruction?
A. Yes sir, they wanted it.
37. You spoke of a change from Greenup and Scott Streets
287 to Court Avenue, at the time that a strip of land was dedicated or conveyed to the City to widen Park Avenue.
A. To widen Court.
38. To widen Court Avenue between Third and Park Avenue?
A. Yes sir.
39. As a matter of fact that change was made at the request of the Street Car Company, was it not?
Mr. Cassatt: The Ordinance itself speaks for that.
A. I don't know myself whether the Street Car Company requested it or not.

Mr. Schmitz:

40. What was the extent of traffic on that portion of Greenup Street that is between Park Avenue and Second, and on Scott Street from Park Avenue to Second at the time that change was made?
A. You mean in reference to car traffic?
41. General traffic?

A. General traffic was pretty heavy.

42. In what respect?

A. Well, the wagon traffic followed the car tracks around at those points, and congested it at that point. Court Avenue at that time wasn't made, there was an old cooble stone pavement and the other streets were improved, and wagon traffic followed as a rule, the best streets, if they could get to them, and they all, all the heavy traffic that went over the suspension bridge, had to go over one or the other of those two streets, and they followed them.

43. Now since that change has been made, isn't it true that Scott Street and Greenup Street at those points are very little traveled by anything or anybody?

288 A. There's some traffic there, but not to any extent like what it was before.

44. Mr. Harton, as a matter of fact, the change at that time, by consolidating the tracks that were on Greenup and Scott Streets, so that they ran on Court Street all the way from the entrance to the bridge up to Park Avenue, was one advantageous to the Street Car Company, was it not?

A. It was, yes sir.

45. After that change had been decided upon, by the passage of the Ordinance mentioned in your testimony, what was done by the Street Car Company with reference to locating its general offices?

A. The general offices were located at Third and Court Avenue.

46. And that was a new building that was then erected?

A. Yes sir.

47. And it took in the entire east side of Court Avenue between Third and Park Place?

A. Yes sir.

48. Which of your lines would pass the office building at that point?

A. All of our lines pass the office at that point now from Cincinnati.

49. And going to Cincinnati?

A. Yes sir; going to Cincinnati.

50. With one exception, you might mention that?

A. Well, that's the line coming out Third Street, but that, you might say passes there at the same time.

51. Prior to that change, there was no such opportunity of

289 supervising your cars as they would come and go from Cincinnati to Covington and from Covington to Cincinnati?

A. The office formerly was located at Fourth & Scott Streets, and the lines passing that were the lines coming from Cincinnati, but not going to Cincinnati; the other lines traveled over Third Street.

52. There is not a single car since that change which does not come within thirty feet of that building, is there?

A. No sir.

53. As it goes along the tracks?

A. No sir.

54. In what other respects did this change operate for the accommodation of passengers, street car passengers, and for the greater

convenience of the Company, by way of suggestion, let me mention the changing from one car to another or the waiting of crowds of passengers for accommodations?

A. It facilitated the exchange of passengers from one line to another, because it brought all the lines to one central point.

55. You said in answer to questions put to you on direct examination that it was impossible to operate an additional track, or tracks on Third Street from Main, west, Crescent Avenue from Second to Third, and Second from Crescent Avenue to the corporation line, will you give the exact width of those streets between curbs?

A. Second Street is thirty-six feet between curbs; Third Street runs 27.33 feet; it varies between 27 and 33 feet, between curbs; Crescent Avenue is 36 feet.

290 56. Do you mean to say that Third Street from Main west now varies as to its width between curbs?

A. No: between Main and — other street, it is thirty-three feet, but from Scott, from Court on down, it is twenty-seven.

57. You mean from Scott to,——

A. To Main, well, between Johnson and Main, there's a place in there that's 29 feet.

58. There's but a single track on Third from Main east isn't there?

A. Main to Scott, yes sir.

59. Do you mean to say that it would be impossible to operate another track on that portion of Third?

A. No, I didn't say that; I said from Main west.

60. Now, I believe you said that where you have double tracks the distance between the outer rails of the two tracks was fourteen feet?

A. Fourteen feet eleven inches; practically about 15 feet.

61. What would be the distance between the outer ends of the ties of the two tracks?

A. Seventeen feet and eight inches.

62. Of course they are covered up by the paving?

A. Yes sir.

63. Outside of the rails?

A. Yes sir; outside of the fourteen feet eleven inches it is covered up by the pavement.

64. Will you file a statement showing the width of the streets between curb lines on which the tracks are laid, embraced in your testimony here?

291 A. Yes sir.

65. You gave it as your opinion that it was impracticable to operate additional lines, street car lines, on those streets, unless some arrangement was made with your company, will you tell me a little more in detail the reason why it would be impracticable?

A. Well we now occupy practically 18 foot of space with our tracks on the streets on which we operate a double track, and if your street is forty feet between curbs, it allows you then the difference between the two, which would be twenty-two feet, and that would

be proportioned to 11 feet on each side of your trackage. If you had another track between your tracks and the curb, they would occupy 9 foot of each of those spaces; in other words, the whole street would be occupied by street railway tracks, so that, vehicle traffice would be at a standstill, if two companies were operating four tracks on a street of forty feet width.

65. Isn't it a fact that today the space occupied by your tracks is used by vehicles, just as much as other parts of the street?

A. They do to a certain extent, but then they have the right to get out of the way, without anything else interfering with them on the other side, and them, if your other tracks were there, you would have operation of street car lines and street cars there that probably would be together. There might come a time when you would have the whole street occupied by street cars.

67. In other words, if there were four cars on four different tracks, they would, for the time being obstruct traffic?

292 A. Absolutely block the streets, yes sir.

68. At least, the free moving of traffic?

A. Free movement, yes sir.

69. In connection with intersections, you spoke of additional lines creating a jumble, or putting you out of business. Will you explain what you meant by that?

A. Well, for instance, if we had, if we came to the intersection at Eleventh and Madison, we have two tracks branching off to the east, and two to the west. Now if another Company should come in there, I don't know how in the world they would lay the tracks in there, because we practically occupy the street at these points with our trackage. I don't know how they would get into that; they couldn't turn off, to get off to the side of the street, outside of our tracks, because there wouldn't be enough room to turn around the corner, because running from the center of the street, as we do now, we only have a clearance at the curb corner, at the apex, where the two curb lines intersect, we only have about two feet. In other words, there are conditions, special conditions with reference to intersections in which it would become absolutely necessary, that no matter how many lines may be on the streets, the- would all have to use the same connections at intersections, they would have to, but if they had tracks to the side of us, I don't see how they would get in there to use our tracks.

70. Where you intersect or turn corners at some intersections there wouldn't be enough room for the same arrangement

293 for another line, that's what you mean?

A. Yes sir.

71. So that, nece sarily there would have to be a joint use?

A. And still, at the same time, I don't see how they would get in there to use our tracks. I don't see how they would be able to swing into our tracks.

72. On the other hand it would be possible to lay tracks of an additional line, so as to cover some of the same space that your tracks cover?

A. Well they would have to cut in and build trackage on our

right of way, which would cause an intereference with the operation of cars at that point.

73. In any event, additional lines would necessarily, at one point or another cut into or cross your tracks?

A. They would have to.

74. In making your statement, will you separate the trackage under the 11-4/10 miles testified to, from the balance of the trackage in the City of Covington used by your Company?

A. I will enumerate it so that the South Covington & Cincinnati Railway Company will include the 11-4/10 miles; the Cincinnati, Covington & Rosedale will cover the part controlled by them, and the Covington & Latonia will be controlled by it; that's the three lines.

75. I would also ask you to add to that statement the length of the streets mentioned in it?

A. I will do so.

(The same is attached, marked "Exhibit A.")

294 Redirect examination by A. C. Cassatt, for the plaintiff:

1. Mr. Harton, you spoke about the trackage in the City of Covington, controlled by the Cincinnati, Covington & Rosedale Railway Company, can you state approximately the length of that mileage in the City of Covington?

A. I can't off hand, but I can give you the length of the Covington & Latonia and the Cincinnati, Covington and Rosedale combined.

2. The two that are not owned by the South Covington & Cincinnati Street Railway?

A. Yes sir; I can give you that. It is practically about half, 11-3/10 miles.

3. That in addition to the 11-4/10 miles, of which the franchises are owned direct by the South Covington & Cincinnati Street Railway Company?

A. Yes sir.

4. Now take the Cincinnati, Covington & Rosedale trackage, or line, the franchise for the use of that line is in the name of the Cincinnati, Covington & Rosedale Railway Company, is it not?

A. Yes sir.

5. The road was built by the South Covington & Cincinnati Street Railway Company, was it not?

A. Yes sir.

6. And it has been operated since the time it was built by the South Covington & Cincinnati Street Railway Company, has it not?

295 A. Yes sir.

7. The same is true of the Covington & Latonia trackage in the City of Covington?

A. Yes sir.

8. So that the entire street railway system operated in the City

of Covington is operated by the South Covington & Cincinnati Street Railway Company

A. Yes sir.

9. Do you know the duration of the Cincinnati, Covington & Rosedale franchise?

A. Fifty years.

10. From what date, if you recall?

A. It was in October 1890.

11. As a matter of fact therefore, the lines which you have referred to, as the Cincinnati, Covington & Rosedale lines and the Covington & Latonia lines, were built, and have been at all times controlled and operated by the South Covington & Cincinnati Street Railway Company?

A. Yes sir.

12. And it is only the franchises of those lines which stand in the name of the other two companies?

A. Yes sir.

13. You were asked whether the changes made under what is known as the Court Avenue Ordinance of July 11, 1901, were made at the request of the Street Railway Company, I call your attention to a copy of the Ordinance, in evidence in this case, and will ask you to read the preamble to that Ordinance, and see if that refreshes your recollection as to who requested the change to be made?

296 (Handing the witness a copy of Ordinance).

A. (Examining copy of Ordinance) The Ordinance states that the City of Covington made the request.

14. Have you any knowledge, independent of that Ordinance, as to who initiated or requested the making of the change?

A. No sir.

15. Isn't it a fact that that Ordinance provided for the Company to give up five blocks of the City Streets of Covington and accept in exchange therefor about three blocks?

A. We gave up six or seven blocks and we got in return four.

16. I will ask you to state whether the concentration of all the lines on Court Avenue, as provided in that Ordinance, was not for the great convenience of the traveling public of the City of Covington?

A. It was.

17. I will ask you to state whether under the terms of that Ordinance, the Street Railway Company contributed a strip of land twelve feet deep for the widening of Court Avenue?

A. It did.

18. This building which has been referred to, by Counsel for the City in his cross examination, as being built along Court Avenue, was built upon property theretofore owned by the Street Railway Company, was it not?

297 A. Yes sir. The property was purchased to get in possession of it so that the twelve foot strip could be dedicated to the City; the Street Railway Company then built its office building on the remainder of the lot.

19. Are all the lines operated by you in the City of Covington, operated as one system?

A. Yes sir.

20. In connection with the lines operated in Newport and in Cincinnati?

A. Yes sir.

21. Please state whether all of the cars operated by the Company since you have been connected with it up to the present time, in the City of Covington are operated to the City of Cincinnati?

A. Yes sir: with the exception of during a certain interval in the day, the Latonia lines only operate to State Street: and the Crosstown line between Newport and Covington.

22. How much of a line is the Crosstown line between Newport and Covington?

A. The round trip mileage on it is a little over two miles.

23. How many cars are there?

A. One.

24. One car?

A. Yes sir.

25. At what hour in the day are the Latonia cars operated only to State Street?

A. From Nine o'clock in the morning to Four o'clock in the afternoon.

298 26. How many are there of those Latonia cars that are so operated between those hours?

A. There's two.

27. Only two cars?

A. That's all.

Recross-Examination by Frederick W. Schmitz, for the defendant.

1. As a result of the enactment of the Court Avenue Ordinance, you stated that the Company surrendered the right of way on seven blocks?

A. Yes sir.

2. For the right of way on four blocks?

A. Yes sir.

3. What was the effect of that change with reference to the operation of the cars?

A. Well, the operation, we were able then to facilitate the movement, so the people could get to and from their homes to a better advantage, and we also were not interfered with by traffic, vehicle traffic conditions.

4. In other words, you gained just that much time?

A. We gained that much time, and were able to serve the same purposes better, yes sir.

5. The streets mentioned under Section 2 of the Ordinance providing for the letting of a franchise, Ordinance No. 9069,

299 include then all of the streets covered by tracks under the franchise, other than the Rosedale grant, as well as all other streets in the City of Covington used for street car purposes?

A. It covers completely the entire system operated within the City of Covington, as we now operate it.

6. How many miles altogether of trackage?

A. 22.7.

W. H. HARTON.

STATE OF OHIO,
County of Hamilton, ss:

The undersigned, Allan Smith, a Notary Public in and for Hamilton County, Ohio, certifies that the foregoing deposition was taken before him, in accordance with the stipulation hereinbefore set forth; that the witness was duly sworn, as heretofore stated; and that Alfred C. Cassatt and Frank W. Cottle were present on behalf of the Plaintiff, and Frederick W. Schmitz was present on behalf of the defendant.

I further certify that the foregoing is a true and correct transcript of the testimony taken before me.

[SEAL.] ALLAN SMITH,
Notary Public in and for Hamilton County, Ohio.

My commission expires June 17, 1917.

300 EXHIBIT A.

South Covington & Cincinnati Street Railway Company.

Between—			Distance between face of curbs.
		Pike St.	
At Main	(single)		35.10
Lee at 9th	"		34.60
At Craig	"		34.72
West of R. R. Crossing	"	2732.70 ft.	34.42
Russell & Washington			34.2
At Madison Avenue			34.82
		Fourth St.	
Garrard & Sanford	(single)		27.15
Sanford & Greenup	"		27.08
Greenup & Scott	"	3372.65 ft.	27.57
Scott & Madison			27.32
Madison & Russell			27.30
At Main			27.35
?			
		Third Street.	
Court & Scott	(single)		27.80
Scott & Madison	"		27.22
Madison & Russell	"		27.18
Russell & Johns ..	"	4481.9	27.22
Johns & Main	"		29.12

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Between—			Distance between face of curbs.
Main & Bakewell	(double)	.....	33.25
Bakewell & Philadelphia	"	.....	33.17
Philadelphia & Crescent	"	.....	33.40
Crescent.			
2nd and 3rd	(double)	480.7.....	36.30
Madison.			
3rd & 4th	(double)	.....	39.20
4th and 5th	"	.....	39.20
At Pike St.	"	.....	39.24
11th & Robbins	"	8289.10.....	39.35
At 14th St.	"	.....	39.32
At 20th		.....	39.32
Corp. Line (340 ft. S. of 20th.)			
301			
Greenup.			
Park & 4th	(double)	.....	41.85
Robbins & Lynn	"	.....	39.00
11th & 12th	"	.....	39.00
Pleasant & Bird	"	7651.3 ft.....	39.25
At 15th	"	.....	39.30
15th & 16th	(single)	.....	27.25
At 20th	(double)	.....	39.40
Lynn & 11th	"	.....	39.07
Main.			
3rd & 4th	(sing')	.....	35.15
4th & 5th	"	.....	35.20
6th & 7th	"	3313.95 ft.....	35.25
At 9th	"	.....	35.22
9th & Pike	"	.....	27.40
At Pike	"	.....	27.50
Second.			
Crescent & Western	(double)	.....	36.60
West Corporation	"	1134.80 ft.....	38.20
Fifteenth.			
At Greenup	(single)	.....	27.10
Garrard & Mendall	"	1641.00 ft.....	27.15
To Eastern Avenue			

CLOSE IN CENTER

Between—			Distance between face of curbs.
Eastern.			
At 15th	(single)	.....	27.20
At Curve	"	.....	27.25
At Oliver	"	3245.20 ft.	27.30
At 20th	"	.....	27.30
At Corporation St.	"	.....	27.31
Garrard.			
At Corporation St.	(single)	.....	30.00
At 20th	"	610.80 ft.	30.12
Court Avenue.			
At Second	(double)	.....	40.07
At 3rd St.	"	741.15 ft.	40.02
At 3rd S.	"	.....	56.00

302

Park Place.			
Greenup & Court	(double)	.....	79.54
Court & Scott	(single)	465.6 ft.	79.7
Scott.			
Park & 4th	(single)	123.40 ft.	39.28
Corporation St.			
Eastern-Garrard	(single)	610 ft.	Street not made.
20th St. Between Madison & Garrard.			
At Madison	(double)	.....	40.3
At Scott	"	1289.2 ft.	40.17
At Greenup	"	.....	40.27
Bet. Greenup & Garrard	(single)	.....	27.70
Pike St.			
At Western	(double)	.....	36.20
At Hermes	(double)	.....	35.10
E. of Hermes	(single)	.....	34.85
At Lewis	"	2456.1 ft.	35.05
At Bullock	"	.....	34.80
At South Main	"	.....	35.00
At North Main	"	.....	35.08

Between—			Distance between face of curbs.

Cincinnati, Covington & Rosedale Ry. Company.

Madison Pike.

Grant from Banklick Turnpike Co.

Old Corporation Line	(double)	.....	39.85
Private Right of Way	"	2742 ft.	

Private Right of Way.

Through Blick & Phillips and Levassor Estate	(double)	1927.4 ft.....	Street not made.

303

Decoursey (Formerly Main), 31st to Southern.

Grant—South Covington & Taylor Mill Tp.

At 31st	(double)	.....	38.20
At Daniels	"	.....	38.3
South of R. R. Crossing	"	2424.80 ft.....	37.75
At 36th		.....	38.05
At Southern		.....	38.32

Huntington, Southern to Taylor.

Grant R. A. Cochran et al.

At Southern	(double)	1424.70 ft.....	40.15

12th St. Licking River Bridge to Greenup.

At Garrard	(single)	.....	28.08
At Garrard	"	1152.6 ft.....	28.04
Prospect	"	.....	28.06

11th St., Greenup to Russell.

At Greenup	(double)	.....	96.14
Scott & Madison	"	1900.3 ft.....	28.90
At Madison	(single)	.....	28.90

Russell (Robbins to 13th).

Robbins & 11th	(single)	.....	39.00
11th & 12th	(double)	1302.1 ft.....	39.05
12th & 13th	(single)	.....	39.02

Between—			Distance between face of curbs.
		13th—Russell to Holman.	
Russell & Banklick	(single)		27.37
Banklick & Holman	"	502.5 ft.	27.30
		Holman, 12 to 19th.	
12th & 13th	(single)		39.02
S. of 13th	(double)		39.05
14th & 15th	"	3931.85	38.98
17th & 16th	"		39.20
200' S. of Schoolhouse	(double		41.58
		19th.	
At Holman	(single)		27.9
Howell	"	789.30 ft.	28.30
Russell & Holman	"		28.0
304			
		Howell, 21st to 19th.	
At 21st	(single)		43.7
At 20th	"	660 ft.	24.48
At 19th	"		24.0
		21st.	
Howell & Russell	(single)	741 ft.	23.65
		Russell, 21st to 19th.	
21st to 19th	(single)	666.5	27.45
		12th, Russell to Hermes.	
Russell & Banklick	(single)		27.0
At Fisk	"		27.15
Lee & Main	"	3023.95	27.05
At Bullock	"		23.00
At Hermes	"		23.00
		Robbins, Russell to Madison	
At Madison	(single)		27.35
At E. end of Bridge	"	963.50	28.93
At Russell	"		27.2
		Hermes, 12th—Pike.	
At 12th	(single)		22.55
At Pike	"	501.6	22.45

Between—			Distance between face of curbs.
		Montague.	
At P. R. W.	(single)	.....	25.10
At Western	"	615.3 ft.....	25.00
		Covington & Latonia Railroad Co.	
		Southern, Decoursey to Huntington.	
At Decoursey	(double)	.....	38.15
Lincoln & Park	"	2278.7 ft.....	38.00
At Huntington	"	.....	38.18
305			
		Huntington, Taylor to Loop.	
At 40th	(double)	.....	40.15
At 41st	"	.....	40.00
At Single Track	"	2377.1 ft.....No curb on E. side.	
At 44th	(single)	..... do.	
Head of loop	"	..... do.	
		34th (Formerly Hamlin), Decoursey to Eugenia.	
At Decoursey	(double)	.....	38.15
Rogers & Carolina	"	2278.7 ft.....	38.00
Graff & Southern		.....	38.18
		Eugenia (34th to P. R. W.).	
34th to Private right of way	(double)	140.8 ft.....	38.00
		35th (Formerly Sanford), Eugenia to Latonia.	
At Grace	(double)	.....	38.00
E. of Latonia	"	984.2 ft.....	38.2
		35th (Formerly Sanford) Latonia to Carlisle.	
		Grant S. Cov. Land & Home Co., Private Right of Way.	
Latonia to Carlisle	(single)	272.2 ft.....	30.2
		Carlisle, 35th to Private Property.	
		Private Right of Way.	
35th & Private Property	(single)	383.3.....	30.1
		Latonia, Private Property to 35th.	
Private Property to 35th	(single)	459.70 ft.....	36.0
		Cherry St., K. C. R. R. to Main St.	
K. C. R. R. & Main St.	(double)	755.5 ft.....Street not made.	

306 *Opinion.*

Filed October 19, 1914.

United States District Court, Eastern District of Kentucky.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY
v.
THE CITY OF COVINGTON.

This cause is before me on plaintiff's motion for a preliminary injunction and on defendant's to dismiss the bill. Pending them defendant filed its answer.

The relief which plaintiff seeks is an injunction restraining defendant from accepting any bid or making any grant under an ordinance passed by its Council, July 14" 1913, providing for the letting at public bidding and granting for the term of twenty years of a street railway franchise. The ground upon which plaintiff claims that it is entitled to this relief is that it now occupies the streets covered by the proposed franchise with a street railway under grants from the defendant, by virtue of which it has a perpetual right so to do and the ordinance complained of is an impairment of the obligation of those grants. Unquestionably it does impair the obligation thereof and plaintiff is entitled to the relief it seeks, if its claim to a perpetual right is well taken. This is so because, rightly interpreted, the ordinance provides for the operation of another street railway on those streets in exclusion of plaintiff.

Plaintiff's right to the relief which it seeks, therefore, depends solely upon the question whether it has, as it claims, a perpetual right to operate and maintain a street railway on the streets
307 of the defendant now occupied by it.

It was incorporated by a special act of the legislature of Kentucky approved January 25, 1876. Thereby it was given perpetual succession and authorized to carry on the business of constructing, operating and maintaining a street railway on the streets and public highways of defendant and vicinity. The act did not grant to plaintiff directly the right to use those streets and public highways, but authorized defendant and the corporations owning the public highways out of the city to grant it the right so to do and, if it could not acquire the right by agreement, to condemn it. It further authorized it to acquire, hold and operate any other street railway in defendant, Cincinnati, Newport, or vicinity by purchase, lease or consolidation.

It operates and maintains its street railway mainly under two main grants from defendant. These grants cover different streets. One was made to it directly and the other to E. F. Abbott and associates, who conveyed the right thereby acquired to the Covington & Cincinnati Street Railway Company incorporated by a special act of the legislature of Kentucky, approved January 21, 1870, which in turn conveyed it to plaintiff. These two grants should be considered

separately and that in the order of their dates. The first of the two was to Abbott and associates. This grant is covered by two ordinances. The first was passed December 13, 1869. It was limited to certain routes therein specified. It recited that its "terms, stipulations and covenants" were contained in a written agree-
308 ment made by and between the "city and the grantees, of even date herewith and of record in the minutes" of the council. The record of the agreement referred to followed immediately the ordinance, but it was dated "— day of —— 1869" and unexecuted. It was however, subsequently, i. e. December 23rd, 1869, executed and again put to record, in the minutes of the Council. One of the provisions thereof was that the work of the construction should be begun within thirty days and be completed within nine months from and after the date of the agreement. This provision was not complied with and nothing was done prior to December 28, 1874. It is this fact that gave rise to the second ordinance, which was passed on that date. It extended "the time for the commencement of the work of construction of the street railway line set forth in the contract of December 23, 1869" for six months from its passage "upon the terms, conditions and stipulations contained in said contract as if the same were herein repeated." It modified the routes in a certain particular. In connection with the grant thus made by these two ordinances an additional grant was made by an ordinance passed January 28, 1875, should be considered. It authorized Abbott and associates to construct a certain line connecting the northernmost part of the routes covered by the previous ordinance, opposite the Suspension Bridge over the Ohio River, therewith.

The first of these three ordinances, i. e. that of December 13, 1869, was passed and the contract of December 23, 1869 made pursuant thereto, was made before the incorporation of the Covington & Cincinnati Street Railway Company, January 21, 1870, and the other two ordinances subsequent thereto. The deed of convey-
ance from Abbott and associates to that Company was made
309 after the passage of all three ordinances, i. e. May 1, 1875, and that from it to plaintiff was made December 20th, 1876, within a year after the latter's incorporation, January 25, 1876. These deeds of conveyance had the effect of passing and vesting in the plaintiff whatever rights Abbott and associates acquired under the grant to them. The grant to them was made to them and their successors and assigns. They were the incorporator- of the Covington & Cincinnati Street Railway Company. The defendant was authorized to grant it the right of way along its streets and public highways for the construction and operation of a street railway. It was further expressly authorized to purchase and hold such routes and railway tracks as might be deemed requisite for its use and to sell and convey the same at pleasure. And, as heretofore stated, plaintiff was authorized by its charter to acquire, hold and operate any street railway in the defendant by purchase, lease or consolidation.

What right then did Abbott and associates acquire under the grant to them? This depends on what right the defendant had the

power to grant to them, and on what right it did in fact so grant them? Did it have power to grant to them a perpetual right? And did it in fact grant to them such a right? The plaintiff and defendant take issue on both these questions. And first as to the question of power. Defendant contends that it derived no power to make the grant under the charter of the Covington & Cincinnati Street Railway Company. This is so, because the grant was not make to that Company, but to Abbott and associates, and, so far as it depended on the ordinance of December 13, 1869, and the contract of December 23, 1869, made pursuant thereto, it was made before
310 its incorporation. It will allow no effect to be given to the circumstance that Abbott and associates were the incorporators of that Company. Passing by the charter of that Company as a source of power for making the grant it is to be considered whether otherwise there was any legislative grant of such power. By Section 2 of the Consolidation Act of March 2, 1850 (Kentucky Acts 1849-50, p. 239, Wells' Revision, p. 104) it was provided:

"That all the streets, roads, lanes, alleys, commons, market spaces, public squares and grounds and public landings in said city, be and at the same time are hereby vested in the city; and where, the owner of any land, within said corporation, shall lay out any street, lane, alley or any ground for public use and so dedicate the same, it shall immediately vest in the city and the authorities thereof shall have exclusive control over the same for the public use and good."

And by Section 19 thereof it was provided:

"The Council shall have the exclusive power to establish and regulate market spaces, wharves, docks, and to fix the rates of wharfage and other fees for the use thereof; and they shall also have exclusive power to establish and regulate the grades of all wharves and landings; all banks of the rivers Ohio and Licking within the corporation limits; and all sidewalks, streets, alleys, lanes, spaces, and commons of the city. They shall also have the exclusive control of the streets, sidewalks, lanes, alleys, market spaces, and other public grounds within the corporate limits and shall cause the same to be kept clean and in repair."

By virtue of these provisions the defendant, at the time of the grant to Abbott and associates, was vested with an absolute title in its streets, was empowered to regulate them and had the exclusive control thereof. This title and right to regulate and control was sufficient in itself to empower defendant to grant to Abbott and associates a perpetual right to construct, operate, and maintain a street railway on its streets. That such was the case has been decided recently by the Supreme Court of the United States in the
311 case of Owensboro vs. Cumberland Telephone & Telegraph Company, 230 U. S. 58, which went to that court from this state. It was there held that by virtue of the power conferred on the City of Owensboro in its charter "to regulate the streets, alleys and sidewalks and all improvements and repairs thereof," which was less sweeping in its character than that conferred on the defendant, by its charter, that city had power to make a grant of a perpetual franchise to construct, operate and maintain a telephone

system on its streets. Though four of the judges dissented from the conclusion in that case it was not on this ground. The only difference between that case and this is that there the franchise involved was a telephone franchise whereas here it is a street railway franchise. But it is not open to argument that this difference calls for a difference of decision.

The appositeness and controlling force of this decision, a decision of the Supreme Court of the United States in a Kentucky case, renders any further consideration of the question of power unnecessary. There can be no doubt that the defendant did have power to grant a perpetual franchise to Abbott and associates.

This brings us to the question whether it did in fact grant such a franchise to them. And as to this also there would seem to be no possible room for doubt. Both in the ordinance of December 13, 1869 and the contract of December 23, 1869, made pursuant thereto, it was provided that defendant granted to Abbott and as-
312 sociates "all the authority and right" that it had "the capacity to grant." We have just seen that it had the capacity to grant to them a perpetual franchise. The provision then that there was granted all the authority and right that the city had the capacity to grant was the same as if it had said in so many words that it granted a perpetual franchise. The English language is not so poor that the same idea cannot be expressed in different ways. Here, instead of saying that a perpetual franchise was granted it was said that all the authority and right which the city had the capacity to grant was granted, which meant exactly the same thing.

Possibly the phraseology used indicates that defendant was not sure of the extent of its power and that the effect of the grant would be to pass a perpetual franchise. But it is clear that it intended that Abbott and associates should thereby acquire as enduring a franchise as it had the power to grant and as it had power to grant a perpetual franchise, it was within its intent that such a franchise should pass by the grant which it made. That the intent was to grant a perpetual franchise is enforced by another consideration. In the ordinance it was provided that the grant was made upon condition and in consideration of the strict and faithful performance by the grantees of all the terms, stipulations and covenants set forth in the contract, which it recited was of even date therewith and of record in the minutes of the council and that the grant should "determine upon failure of such performance." It appears from this provision that the only termination of the right granted, contemplated by the parties, was upon the happening of this
313 condition subsequent. Point is made of the fact that there is no such condition subsequent contained in the contract itself. But this is of no consequence. It is sufficient that it is set forth in the ordinance.

The question has arisen in the courts quite frequently in recent years as to the duration of a grant by a municipality to a public service corporation of the right to use its streets where the grant is silent as to its duration. This question also arose in the Owens-

boro case and it was there held that such a grant is a grant of a perpetual right to use the streets. Mr. Justice Lurton there said:

"If there be authority to make the grant and it contains no limitation or qualification as to duration the plainest principles of justice and right demand that it shall not be cut down in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in People v. O'Brien, 111 N. Y., 142; 2 L. R. A. 255; 7 Am. St. Rep. 18 N. E. 692; a decision accepted and approved by this court in Detroit v. Detroit Citizens St. Ry. Co., 184 U. S., 368; 46 L. Ed. 592, 610; 22 Supreme Court Rep. 410. 'The grant to the railway company may or not have been improvident on the part of the municipality but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the Company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not, for a limited term only,' Dill Mun. Corp. 5th Edition, Sect. 1265."

The four dissenting judges did not disagree with the majority
314 on this point. Here also this decision of the Supreme Court of the United States in a Kentucky case is controlling upon this Court. The Sixth Circuit Court of Appeals had theretofore, held the same thing in the case of

Morristown vs. E. Tenn. Tel. Co., 115 Fed. 304, a Tennessee case; and under the authority of that case I had so held in the case of

E. Tenn. Tel. Co. v. Frankfort, 190 Fed. 346, a Kentucky case.

But this case is not the same as those cases. This is not a case where the grant is silent as to its duration and, therefore, there is no need to rely on them to support the position that the grant under consideration was a grant of a right in perpetuity. It is a case where the grant is express as to duration. It is true that it does not say in so many words that the right granted shall last forever. But the defendant had the capacity to grant such a right and it provided that the grantees should have all the right which it had the capacity to grant and the only termination thereof which it provided for was a termination on the happening of the condition subsequent called for i. e., the nonperformance by the grantees of any of the terms, stipulations or covenants set forth in the contract. As heretofore stated this meant exactly the same as if it had been provided in so

many words that the right granted was one in perpetuity subject to be terminated only by the happening of the condition subsequent.

But notwithstanding all this it is contended on behalf of
315 defendant that the grant was for a definite period of time, towit 25 years from the date of the grant, which has long ago expired. In view of what has been thus far set forth such a claim is calculated to surprise one who does not know that it is coming. The basis of it is this. Prior to the making of the grant to Abbott and associates by an act of the legislature of Kentucky, approved February 9, 1864, the Covington Street Railway Company was incorporated and given perpetual succession. It was thereby authorized to carry on the business of constructing and using railways along the streets of Covington and in the suburbs of the city and defendant was authorized to grant it the right to construct and use a street railway along its streets. On November 10, 1864, through its incorporators it made application to defendant's council for a grant to it of the "right of way to lay down" tracks along certain specified streets "with the privileges necessary to operate the same." This application was referred to a special committee, which, December 1, 1864, reported in favor of granting the application with a certain change in the route set forth therein, and, on December 5, 1864, the report was approved and the Committee on Law in conjunction with the City Attorney was instructed to report an ordinance granting the franchise asked for agreeable to the report of the Committee. This Committee reported and the Council passed an ordinance December 15, 1864. In view of the preceding steps one would expect the ordinance so reported and passed to be an ordinance granting to that company the franchise applied for, and they indicate that
316 council regarded such was its character. But according to defendant's position such was not the case. It was a general ordinance regulating the operation of all street railways in the city and providing that the terms of all franchises granted by the city should be for twenty-five years. According to the position heretofore taken as to the effect of the provision in defendant's charter vesting the title to its streets in it, authorizing it to regulate the use of same, and giving it the exclusive control thereof council had power to enact such an ordinance as to individuals and to corporations authorized to construct and operate a street railway in defendant and not otherwise did it have such power. It did not have such power under the charter of the Covington Street Railway Company for the power thereby conferred was limited to making a grant to that Company. The claim of defendant that such is the character of the ordinance of December 15, 1864, therefore, presupposes that that position is well taken. Seemingly the ordinance was in part of the character claimed by the defendant. And for the sake of the argument it will be assumed that such was the case as to such part. Such, however, is not a complete description thereof. The 10th section ordained that the franchise for street railroads provided for according to the plan of the roads as laid down in the schedule of the Covington Street Railroad Company be granted to any responsible company which would pay to the city the largest bonus for the same

and to the incorporators of that company any expense they
317 had incurred in making the survey of the routes together with maps and estimates not to exceed $100.00. The 11th section provided for the making of a certain advertisement that sealed proposals would be received until February 1st, 1865, for the franchise and that it would be awarded to the highest and best bidder at the first meeting of council thereafter. It concluded with this recital:

"It being understood that the present incorporators propose to transfer their rights and privileges in and to the charter obtained by them for a street railroad in this city, to the company or individual offering the largest bonus for the above mentioned franchise."

These provisions contemplated, that in any contingency, the franchise which was thus to be offered for sale and awarded to the highest and best bidder would go to the Covington Street Railway Company. It would go there either by that Company becoming such bidder or by such bidder acquiring the right to such company and transferring his bid to it. By the 13th section of the ordinance it was provided that all contracts made under its provisions should be for the term and period of twenty-five years.

Pursuant to this ordinance the franchise over the routes specified in the Covington Street Railway Company's application was offered for sale. It was purchased by Thomas Sherlock and Malcolm McDowell for themselves and their associates. They acquired the right to that company and transferred the franchise to it. And on August 16, 1865 a written contract was entered into between the city and that Company whereby the former granted to the latter a franchise over the routes covered by its application. Prior thereto,
318 towit on August 3, 1865, the ordinance of December 15th, 1864, was amended so as to provide that at the expiration of the 25 year period the city would offer another franchise over the same route and if any person or corporation made a better bid than the Covington Street Railway Company such bid would not be accepted, except on condition that such bidder should pay that company for its property a price to be ascertained as therein provided. By the contract between the defendant and that Company it was provided that the grant thereby made was made upon the terms and conditions contained in the ordinance of December 15, 1864, and the amendment of August 3, 1865.

Under these circumstances and this contract the Covington Street Railway Company entered on one of the routes covered thereby, to with the Madison Avenue route, and constructed and put in operation a street railway thereon. And at the time of the making of the grant to Abbott and his associates December 1869 it was operating this street railway. The routes covered by the grant to Abbott and associates was different from those covered by the grant to the Covington Street Railway Company.

Now it is the contention of defendant that because this ordinance of December 15, 1864, whereby it was provided that all contracts made thereunder should be for the term and period of twenty-five years, was, at the time of the making of the grant to Abbott and

sociates, unrepealed, that grant was for a definite period of time and that twenty-five years from the date when it was made. It would seem not to require much argument to demonstrate the un-
319 soundness of this contention. The mere statement of it may be said to condemn it. Taking the ordinance to be, as it is claimed to have been, i. e. as intended to limit subsequent grants of street railway franchises it must be conceded that the council of 1864 had no power to limit the action of the Council of 1869 and later years and that in determining the extent of the grant made by the latter council it is its intent and not that of the former council which controls. There is not a word in the ordinance of December 13, 1869, or the contract of December 23, 1869 made pursuant thereto referring to the ordinance of December 15, 1864 or which indicates that it was the intention that the grant to Abbott and associates should be affected to any extent by it. On the other hand that ordinance and contract are comprehensive in character and cover substantially all the details that one would expect to find covered in a grant of a street railway franchise. The- cover substantially all the details covered by the earlier ordinances, in some instances making the same provisions and in others a different one. And over and beyond all this whereas the ordinance of December 15, 1864, provided that all contracts made under it should be for twenty-five years, that of December 13, 1869, and the contract made pursuant to it, provided that the grantees should have all the authority and right which the defendant had capacity to grant, which was a right in perpetuity, and the only termination o. that right called for was in the happening of the condition subsequent provided for.

The case of Blair v. Chicago, 201 U. S. 400, does not sup-
320 port defendant's contention that the grant to Abbott and associates was for twenty-five years only because of the ordinance of December 15, 1864. The question there was as to whether a certain provision in an act of the legislature of Illinois extended grants to certain street railroad corporations made by the City of Chicago for the term of 25 years for 99 years longer. It was held that it did not. We have no such question here.

That the grant to Abbott and associate *as* to no extent affected by the ordinance of December 15, 1864 has been held by the Kenton Circuit Court in the case of Covington vs. South Covington & Cincinnati Street Railway Company, 147 Kentucky 326, where the judgment of that court was affirmed by the Court of Appeals of Kentucky, though no me*n*ion was made in its decision of this particular decision of the lower court. It must be held, therefore, that the grant made to Abbott and associates by the ordinance of December 13, 1869 and the contract of December 23, 1869, made pursuant thereto was intended to pass a perpetual franchise. The extending ordinance of December 28, 1874, provided that the extension of time thereby granted was upon "the terms, conditions and stipulations" contained in the contract of December 23, 1869 "as if the same were herein repeated" and that Abbott and associates should "enjoy all the rights and privileges therein granted". And though the ordinance of January 28, 1875 granting the right to

the connecting line between the route covered by the previous ordinances of December 13, 1869, and December 28, 1874, was silent as to the duration of the franchise as to such line it
321 must be taken that the grant was of a perpetual franchise.

At this point there is room for the application in full force of the doctrine of the Morristown, Frankfort and Owensboro cases, particularly in view of the fact that the grantees therein had a perpetual franchise over the route that would be thereby connected with the Suspension Bridge. But the matter is put beyond question by an additional ordinance. A portion of the connecting line was over an alley. On October 13, 1881, after plaintiff's incorporation and the deed of conveyance from the Covington and Cincinnati Street Railway Company and when it had this connecting line in operation, it was proposed by defendant to widen this alley into an avenue which would afford room for a double track and it passed an ordinance whereby plaintiff was authorized to lay a double track thereon and it was provided that it should have the right to use and enjoy same "upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track by the provisions of a certain agreement entered into between E. F. Abbott and the City of Covington on the 23rd day of December 1889.

This brings us to the other main grant under which plaintiff claims. It was made to it directly by an ordinance passed June 8, 1882. But before further consideration thereof note should be taken of a legislative grant made directly to plaintiff under which it operates and maintains a portion of its railway lines. It was contained in an amendment to its charter approved March 13, 1878. Thereby it was authorized "to construct, extend and operate its line of railway along Fourth Street from Scott Street to the
322 Newport and Covington Bridge." This portion of its line was not covered by the grant to Abbott and associates, or the grant to the Covington Street Railway Company. This legislative grant must be taken to have been the grant of a perpetual franchise. It comes within the doctrine of the Morristown, Frankfort and Owensboro cases and was made to a corporation with perpetual succession that then had a perpetual franchise as to the rest of its lines.

The ordinance of June 8, 1882, covered the routes covered by the grant to the Covington Street Railway Company contained in the contract of August 15, 1865, made under the ordinance of December 15, 1864. At that time the Covington Street Railway Company was still operating its line of street railway on Madison Avenue and obtained access to the Suspension Bridge over Scott Street and Second Street and Greenup and Second Streets. It was so operating under a twenty-five year franchise which would expire in a little over eight years thereafter, i. e. August 15, 1890, and that it has such a franchise as to the other routes that it had never entered on. The plaintiff, at that time was operating lines on Scott Street and on Pike and Main Streets, substantially all of the routes covered by the Abbott grant. It had access to the Suspension Bridge by the connecting line herein before referred to, which lay between the two routes by which the Covington Street Railway Company had access

thereto, and was perpendicular thereto. It was so operating under a perpetual franchise and had such a franchise as to the other portions of its routes, under grants from defendant and the Legislature of Kentucky. By the ordinance of December 15, 1864,
323 under which and the contract of August 15, 1865, the Covington Street Railway Company had acquired its rights, it was provided that it could not assign or transfer its franchise without the consent of Council. By the charter of plaintiff passed subsequent to that ordinance it was provided that it might acquire by purchase any other street railway in Covington. It would seem that by virtue of this provision, notwithstanding the provision in the ordinance of December 15, 1864, plaintiff could acquire by purchase the street railway of the Covington Street Railway Company without the consent of defendant's council. Such was the condition of things when the ordinance of June 8, 1882, was passed. The title to the ordinance is as follows:

"An ordinance granting the right of way over certain streets in the City of Covington, to the South Covington & Cincinnati Street Railway Company."

It provided three things. First plaintiff was authorized to contract with the Covington Street Railway Company "for the right of way over and along the street specified in the contract between the said Covington Street Railway Company and the City of Covington dated August 15, 1865." What was meant was that plaintiff was authorized to so contract for the unexpired franchise of the Covington Street Railway Company. Probably the occasion for granting such authority was the provision in the ordinance of December 15, 1864 and that that Company should not assign or transfer its franchise without first obtaining the consent of Council. Secondly it was provided that, consent of the Covington Street Railway Company having been obtained, plaintiff was authorized "to occupy and use the streets specified in said contract for street railway
324 purposes subject to the conditions, limitations, and restrictions contained in the ordinances regulating its rights to the streets" then occupied by it. And lastly it was provided that the rights thereby granted were upon condition that plaintiff should within thirty days after the passage of the ordinance remove its track from its connecting line with the Suspension Bridge and "relinquish all rights and claim to the same."

Now it is defendant's contention that the sole thing which plaintiff acquired by this ordinance was authority to purchase the unexpired franchise of the Covington Street Railway Company. But this position is not tenable. Several considerations are against it. If such was the sole purport of the ordinance why were not its terms confined to granting such authority? They were not so confined. It further authorized plaintiff, having obtained the consent of the Covington Street Railway Company, to occupy and use the streets specified in its contract. It provided that its occupation and use thereof should be subject not to the conditions, limitations and restrictions contained in that contract and the ordinance of December 15, 1864 pursuant to which it was made, but to those con-

tained in the ordinances regulating "its", i. e. plaintiff's right, to the streets then occupied by it. And it provided further that the rights thereby granted were granted upon condition that plaintiff should within thirty days after the passage of the ordinance remove its track on the connecting line with the Suspension Bridge and relinquish all right and claim thereto, which would leave to it as the only means of access thereto the roundabout way in which the
325 Street Railway Company reached the Bridge. As heretofore held it had a perpetual franchise over this connecting line. It is inconceivable that plaintiff would have been willing or the defendant would have expected it to relinquish this valuable right in consideration of the right to purchase and use the Covington Street Railway Company's unexpired eight years franchise, so that on the expiration thereof it would have been without access to the bridge by the original line to which it had a perpetual franchise as heretofore held. Particularly is this so when in fact it had the right to purchase that Company's unexpired franchise without the defendant's consent, the giving of authority to purchase being accounted for by the desire to remove any question as to its right and by the fact that the making of the purchase was made a condition of the making of the grant. But the title of the ordinance is conclusively against this contention. It makes no reference whatever to the matter of authority to make the purchase. The subject matter of the ordinance according thereto is a grant of a right of way over certain streets in the City of Covington to the plaintiff. It must be held, therefore, that this ordinance made an independent grant to the plaintiff of a right of way over the streets covered by the contract with the Covington Street Railway Company.

It remains to determine the duration of this grant. Nothing is said expressly on this subject. According to the title of the ordinance the grant is of a right of way and according to its body it is of a right to use and occupy, without anything being said as to the duration of the right of way or the right to use and occupy.
326 Nothing else appearing, this presents a case for the application in full force of the doctrine of the Morristown, Frankfort and Owensboro cases and according to it the grant is of a right in perpetuity. The ordinance of December 15, 1864 cannot be said to limit it to a twenty-five year franchise. No reference whatever is made to that ordinance, but on the contrary it is expressly provided that the right should be exercised subject to the conditions, limitations and restrictions con-ained in the ordinances regulating the plaintiff's right to the streets then occupied by it. Point is made of the plural word "ordinances" as indicating that it was considered that the ordinance of December 15, 1864 was one of the ordinances regulating plaintiff's right. But that ordinance is not needed to make more than one ordinance regulating plaintiff's right of the streets then occupied by it. There were four ordinances which in terms regulated plaintiff's right so to do. Besides plaintiff had perpetual succession and as heretofore held, it then had a perpetual franchise over certain streets of defendant, mainly under a grant from it, but including a grant as to a small portion thereof from the Legisla-

ture of Kentucky direct. The object intended to be accomplished was to get rid of two independent lines and consolidate them in one line and system which object would be subject to frustration if thereby a perpetual franchise was not granted. I am, therefore, clearly of the opinion that under this ordinance as well as under the Abbott ordinances plaintiff acquired a perpetual franchise. Plaintiff entered under this ordinance, abondoned its connecting
327 line with the Suspension Brige and constructed and put in operation a street railroad over those routes covered by the contract with the Covington Street Railroad Company upon the greater portion of which that Company has never entered. In this connection note should be taken of a still other grant made to the plaintiff by defendant in July 1901, i. e. after the adoption of the present Constitution of Kentucky, which with those already mentioned covers all the grants under which plaintiff operates its line in defendant. By that ordinance plaintiff was authorized to again make a direct connection with the Suspension Bridge by way of Park Place and Court Avenue, in part consideration of its abandonment of its means of access thereto by way of Scott and Second Streets and Greenup and Second Streets, which it had under the ordinance of June 8, 1882. Under this ordinance it abandoned that access and made the new connection and has been operating thereover ever since. After this was done, question was made as to the validity of the ordinance under Section 164 of the Constitution requiring cities to award franchises to the highest bidder. It was held by the Court of Appeals in the case of Woodall vs. South Covington & Cincinnati St. Ry. Co. 137 Ky. 512 that this grant was not within that of constitutional provision and was valid. Judge Hobson said:

"There was no purpose to grant any new franchise to the street railway company; the only purpose was to adjust an old franchise to the present need."

Such being the nature of the grant it should be held that it too conferred a right in perpetuity.

328 Thus far I have dealt with the main contention made on behalf of the defendant. A number of minor ones have been put forward. I have carefully considered them as well as all that has been said on the main ones. I am not sure as to how seriously the minor contentions are urged. I am clearly of the opinion that none of them are well taken. There is nothing in my decision in the case of Shaw vs. City of Covington to support any of them. If still insisted on I can deal with them in a later opinion.

The conclusion of the whole matter is that the plaintiff has a perpetual franchise over the streets in defendant covered by its grants—that it is entitled to the preliminary injunction applied for and that the motion to dismiss the bill should be overruled.

October 19, 1914.

A. M. J. COCHRAN, *Judge.*

329 *Decree.*

Entered & Filed Nov. 17, 1915.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Plaintiff,
v.
THE CITY OF COVINGTON.

This cause came on to be heard on the pleadings and the evidence and was argued by counsel and submitted.

On consideration whereof the Court finds that the plaintiff has a valid and existing perpetual franchise for the operation of street railway lines, as claimed in the bill and shown in the proof upon and along the following streets in the City of Covington, viz:

Pike Street from Main to Madison Avenue; Fourth Street from Licking River Bridge near Garrard west to Main; Third Street from Court to Crescent Avenue; Crescent Avenue from Second to Third; Madison Avenue from Third to the original corporation line, now about 340 feet south of Twentieth Street; Greenup from Park to Twentieth Street; Main Street from Third to Pike; Second Street from Crescent to West Corporation line; Fifteenth Street from Greenup to Eastern Avenue; Eastern Avenue from Fifteenth to Corporation Street; Garrard Street from Corporation Street to Twentieth; Court Avenue from Second to Park Place; Park Place from Greenup to Scott; Scott from Park Place to Fourth; Corporation Street from Eastern Avenue to Garrard Twentieth Street
330 from Garard to Madison Avenue.

The Court further finds that the defendant claims and asserts that plaintiff's franchise on said street- has expired and that plaintiff is operating on said streets without any right and that the ordinance of July 14, 1913, referred to in the bill "Exhibit D" in the testimony, was passed for the purpose of excluding and preventing plaintiff from the operation of its street railway lines in the City of Covington under said perpetual franchise as aforesaid.

The Court further finds that the granting of a franchise under said ordinance of July 14, 1913, and the construction of a street railway line thereunder in accordance with the terms thereof, would be a substantial interference with the franchise and contract rights of the plaintiff on the above named streets and a violation and impairment thereof.

The Court further finds that the passage of said ordinance and the advertisement for bids thereunder and the threatened taking of bids thereunder constitute a cloud upon the title of plaintiff to said franchises and rights and that further proceedings thereunder would result in a multiplicity of suits, contention and an interruption of

the public service of plaintiff and the carriage of passengers and irreparable damage to plaintiff.

Wherefore, it is ordered, adjudged and decreed that defendant, its officers and agents, and each of them, be and they are perpetually enjoined from carrying out the terms of said ordinance of July 14, 1913, from advertising for any further bids thereunder, from accepting any bid or making any grant thereunder, from interfering
331 or attempting to interfere with plaintiff in the mainteance of its street railway lines upon defendant's streets above nance and operation of its street railway lines upon defendant's streets above named, and from acting in such form or manner as would alter, impair, ilmit, infringe or destroy the title of plaintiff in its grants, rights and franchises above described, and plaintiff's title in and to same, and all of them, is forever settled and quieted hereby. To all of which Defendant excepts.

November 17, 1915.

A. M. J. COCHRAN, *Judge.*

332 *Petition for Appeal.*

Filed December 28, 1915.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

To the Hon. A. M. J. Cochran, District Judge:

The above named defendant, City of Covington, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 17th day of November A. D. 1915, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herewith, and defendant prays that this appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, under the rules of said Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of the defendant be made.

THE CITY OF COVINGTON, KENTUCKY.
By FREDERICK W. SCHMITZ, *City Solicitor.*

333 *Assignment of Errors.*

Filed December 28, 1915.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

Now comes the defendant in above entitled cause, and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 17th day of November 1915, to-wit:

1.

That the United States District Court for the Eastern District of Kentucky erred in holding that the plaintiff had a valid and existing perpetual franchise for the operation of street railway lines upon and along the following streets of the City of Covington, to-wit:

Pike Street from Main to Madison Avenue: Fourth St. from Licking River Bridge near Garrard, west to Main; Third Street from Court to Crescent Avenue; Crescent Avenue from Second to Third; Madison Avenue from Third to the original corporation line, now about 340 feet south of Twentieth Street; Greenup from Park to Twentieth Street; Main Street, from Third to Pike; Second St. from Crescent to West Corporation line; Fifteenth Street from
334 Greenup to Eastern Avenue; Eastern Ave. from Fifteenth to Corporation Street; Garrard Street from Corporation Street to Twentieth Street; Court Avenue from Second to Park Place; Park Place from Greenup to Scott; Scott from Park Place to Fourth; Corporation Street from Eastern Avenue to Garrard; Twentieth Street from Garrard to Madison Avenue.

2.

That the United States District Court for the Eastern District of Kentucky erred in adjudging that the City of Covington, its officers and agents and each of them be perpetually enjoined from carrying out the terms of the Covington City Ordinance of July 14, 1913, mentioned in the bill.

3.

That the District Court of the United States for the Eastern District of Kentucky erred in perpetually enjoining the defendant from

interfering or attempting to interfere with plaintiff in the maintenance and operation of its street railway lines upon defendant's streets mentioned under error #1 herein.

4.

That the United States District Court for the Eastern District of Kentucky erred in perpetually enjoining the defendant from acting in any such form or manner as would alter, impair, limit, infiringe or destroy the title of plaintiff in its grants, rights and franchises.

Wherefore, the City of Covington prays that said decree
335 be reversed and that the District Court of the United States for the Eastern District of Kentucky be ordered to enter a decree reversing the decision of the lower court in said cause.

FREDERICK W. SCHMITZ,
City Solicitor for Appellant, City of Covington.

336 *Order.*

Entered & Filed Dec. 30, 1915.

United States District Court, Eastern District of Kentucky.

2880.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

On motion of Frederick W. Schmitz, Esq., Solicitor and counsel for complainant, the City of Covington, defendant, herein, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings, be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of $500.00.

Dated December 30, 1915.

A. M. J. COCHRAN, *Judge.*

337 *Order.*

Entered & Filed Feb. 29, 1916.

In the United States District Court, for the Eastern District of Kentucky.

2880.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
CITY OF COVINGTON, Defendant.

This day came the defendant and executed bond in the sum of five hundred dollars herein. The Court being advised, now orders that said bond be and same is approved and noted of record.

338 *Bond on Appeal or Error.*

Filed February 29, 1916.

United States District Court, Eastern District of Kentucky.

2880.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

Know All Men by These Presents:

That we, the City of Covington, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto South Covington & Cincinnati Railway Company in the full and just sum of Five Hundred Dollars to be paid to the said South Covington & Cincinnati Railway Company, its certain attorneys, legal representatives or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 24th day of February in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at the October term of the District Court of the United States for the Eastern District of Kentucky in a suit pending in said Court, between the City of Covington plaintiff, and South Covington & Cincinnati Street Railway Company, Defendant, judgment was rendered against the said City of Covington, and the said City of Covington having obtained an appeal and filed a copy thereof

in the clerk's office of the said Court to reverse the decree in
339 the aforesaid suit, and a citation directed to the said South Covington & Cincinnati Street Railway Company citing and admonishing it to be and appear at a session of the United States Supreme Court to be holden at the City of Washington, in the District of Columbia, on the — day of —— next.

Now the condition of this obligation is such that if the said City of Covington shall prosecute its appeal to effect and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

CITY OF COVINGTON,
JNO. J. CRAIG, *Mayor,*
FIDELITY & DEPOSIT CO. OF MD.,
By PAUL M. MILLIKEN,
Att'y in Fact.

Approved by—
A. M. J. COCHRAN,
Judge of the U. S. District Court,
Eastern District of Kentucky.

340 United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To The South Covington & Cincinnati Street Railway Company, a Corporation, etc.

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, in said circuit, on the 27 day of July next, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein The City of Covington is appellant, and The South Covington & Cincinnati Street Railway Company is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, as Judge of the said District Court, and the seal of said Court, at Covington this 27″ day of June in the year of our Lord one thousand nine hundred and sixteen and of our Independence the 140″ year.

A. M. J. COCHRAN,
Judge of the U. S. District Court,
Eastern District of Kentucky.

I hereby accept service of the within citation this 28th day of June, 1916.

THE SOUTH COVINGTON & CIN'TI STREET RAILWAY CO.,
By ERNST, CASSATT & COTTLE.

[Endorsed:] No. 2880. U. S. District Court, Eastern District of Kentucky. So. Cov. & Cin'ti St. R'y vs. City of Covington. Citation. Filed — day of —, 19–. — Clerk. By — D. C.

341 *Præcipe.*

United States District Court, Eastern District of Kentucky, — Division.

No. 2880.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY CO., Plaintiff,
vs.
THE CITY OF COVINGTON, Defendant.

Præcipe on Appeal.

To J. W. Menzies, Clerk of said Court:

Please furnish, for use on appeal of this case, a transcript of the record, consisting of the following portions of the record in your Court, to-wit:

1. Bill.
2. Answer.
3. Affidavit of George M. Abbott.
4. Affidavit of Polk Laffoon.
5. Amended affidavit of George M. Abbott.
6. Stipulation as to proof.
7. Exhibit "A"—Plat.
8. Exhibit "B"—Company's compilation of ordinances, etc., the following portions, to-wit:

Front page: Council proceedings of April 15, 1869, etc., ending in middle of page 2, marked "1."

342 Page 27: Contract between Covington Street Railway Co., etc., July 1882, beginning on lower half of page and continuing on pages 28, 29, and 30; marked "2."

Page 63: Advertisement, Cincinnati Times, etc., marked "3."

9. Exhibit "C"—City's compilation of ordinances, etc.
10. Exhibit "D"—Ordinance No. 9069.
11. Exhibit "E"—Record—Woodall vs. City of Covington.
12. Depositions for Plaintiff.
13. Opinion of U. S. District Court.
14. Order.
15. Final Decree.
16. Petition for Appeal.
17. Assignment of Errors.
18. Order allowing appeal.
19. Order approving bond.
20. Appeal bond.

21. Citation.
22. Clerk's Certificate.

(Signed) FREDERICK W. SCHMITZ,
Solicitor for Defendant City of Covington.

The Plaintiffs, South Covington and Cincinnati Street Railway Company, hereby agrees that the foregoing portions of the record in this cause shall constitute the record on appeal.

(Signed) ERNST, CASSATT & COTTLE,
Attorneys for Plaintiff.

343 UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, Clerk of the District Court of the United States for the Eastern District of Kentucky, do hereby certify that the foregoing 342 pages contain a true and complete transcript of the Bill in Equity, Restraining Order, Answer, Affidavit of Geo. M. Abbott, Affidavit of Polk Laffoon, Amended Affidavit of Geo. M. Abbott, Stipulation as to Proof, Order in regard to Proof, Exhibits "B" "C," "D" and "E," Deposition of Harton for Plaintiff, Opinion, Decree, Petition for Appeal, Assignment of Errors, Order granting Appeal, Order approving bond, Bond on Appeal, and Præcipe and acceptance thereof, as the same appear from the originals now on file in my office, and also contain the original Plat filed in the case, and the original citation issued and the Acceptance of the Attorneys for Appellant endorsed thereon.

Witness my hand as clerk, and the seal of said court, this 30″ day of June, A. D. 1916, and of our Independence the 140″ year.

[Seal U. S. District Court, East. Dist. of Ky., U. S. of America.]

J. W. MENZIES,
Clerk U. S. Dist. Court, Eastern District of Ky.

Endorsed on cover: File No. 25,399. E. Kentucky D. C. U. S. Term No. 569. City of Covington, appellant, vs. South Covington & Cincinnati Street Railway Company. Filed July 10th, 1916. File No. 25,399.

Office Supreme Court, U. S.
MAR 14 1918
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 225.

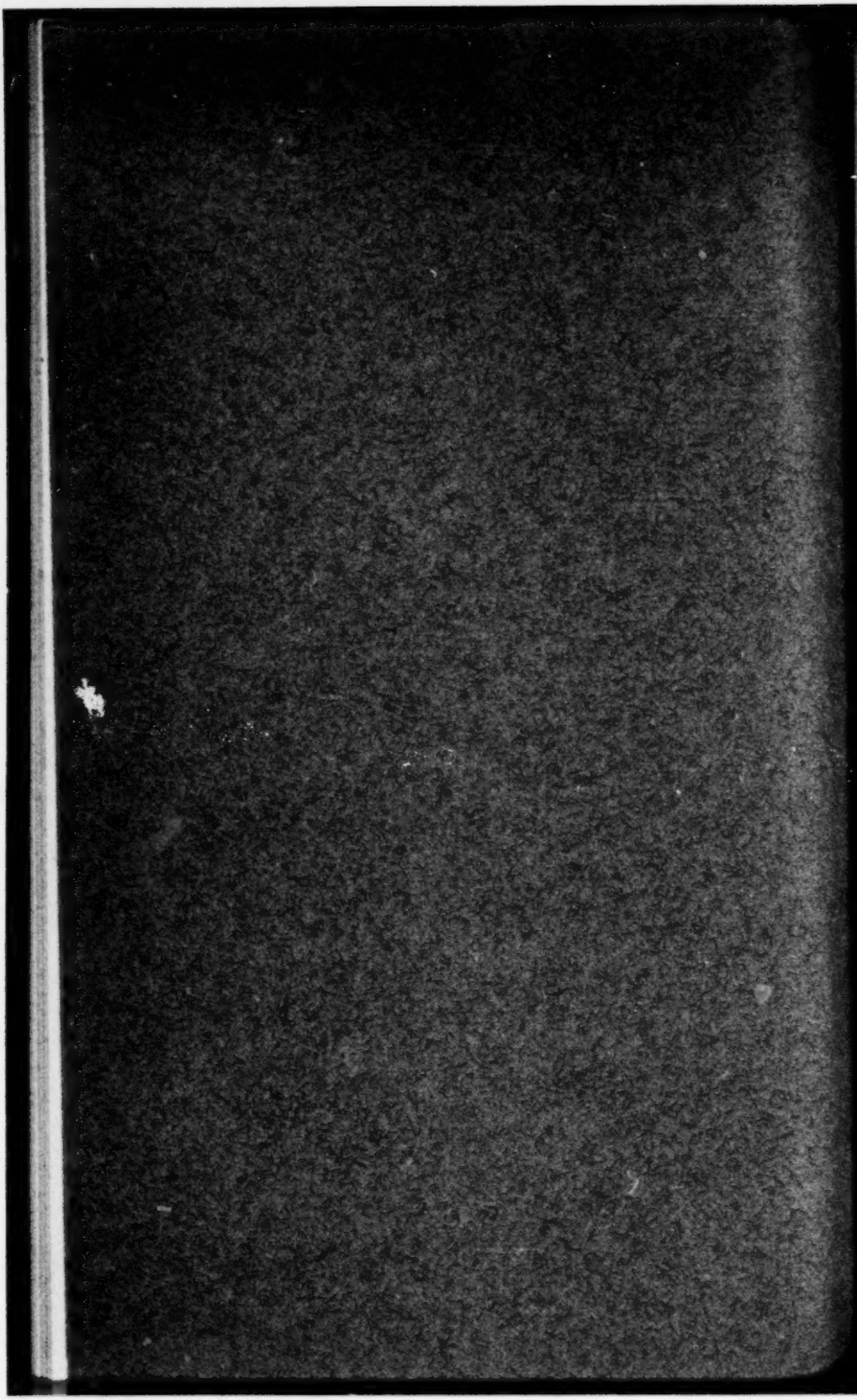
THE CITY OF COVINGTON, APPELLANT,

vs.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, APPELLEE.

REPLY BRIEF FOR APPELLANT.

A. E. STRICKLETT,
Solicitor for Appellant,
The City of Covington.



INDEX TO CASES CITED.

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No. 225.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

THE CITY OF COVINGTON, APPELLANT,

vs.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, APPELLEE.

REPLY BRIEF FOR APPELLANT.

Counsel for appellee seems to place some emphasis upon the fact that under the Act of March 2, 1850 (Kentucky Acts, 1849-1850, page 239), the streets, roads, lanes, commons, market spaces and public squares and grounds and public landings, being vested in the City of Covington, gives the City some extraordinary powers and rights over them. No extraordinary power is thus conferred on the City by this provision, but, on the other hand, the streets and thoroughfares were vested in the City as a trustee for the public use and good. In the case of ROBERTS against CITY OF LOUISVILLE, 92 KENTUCKY, 95, the Board of Aldermen and Councilmen of the City of Louisville were about to pass an ordinance authorizing the Mayor to convey by deed of special warranty to the Commissioners of the Sinking Fund of the City of Louisville all of the real property fronting on the Ohio River, acquired and held by the City for wharf purposes. Suit was filed to enjoin the

passage of the ordinance. Absolute title to this property was vested in the City of Louisville, but the Court of Appeals enjoined the City from passing the ordinance authorizing the transfer of this property; on page 101 the Court said:

> "In every instance, so far as we have observed, wharf property of the City of Louisville has been acquired under act of Legislature and paid for by taxation; and in no case is there evidence of legislative intention it should be held otherwise than in trust for use of the public and in aid of trade and commerce.
>
> "The wharf property being so held, the City of Louisville can not transfer its title or possession, nor, according to a plain and well-settled principle, can the General Council, which is by statute invested with power of control and burdened with duty of maintaining, preserving and operating the wharfs, either delegate the power or disable itself from performing the duties."

The case of WOLFE vs. COVINGTON & LEXINGTON RAILROAD COMPANY, 15 B. MONROE, 404, cited by counsel for appellee, in support of the City's power to grant the franchise in question, involved the right of a property owner to recover damages from the Railroad Company for changing the grade of a street and laying its tracks on a street in front of his house. The Court contented itself by holding that the City had the power to "authorize the introduction of the road into the City, and the use of the streets for its purpose," without discussing from what source the City Council had received such power or authority. Clearly the question of the City's power in the premises was not a question for determination in that case, but if we look to the case of LEXINGTON & OHIO RAILROAD COMPANY vs. APPLEGATE, 8 DANA, 289, cited in the opinion in the Wolfe case, we conclude that the Court based its opinion, not on the general powers of the City under

its charter, but on the authority conferred on such city by the special act of the Legislature incorporating the Railroad Company.

If the Council of the City of Covington had the power and authority to grant the franchise to Abbott and Associates under the general powers of its charters (Acts 1849-1950, page 239), why was it essential to specially confer on the City of Covington in the respective acts incorporating said companies the special power and authority to grant the right to use its streets for street railway purposes? Thus we find in the act incorporating the Covington & Cincinnati Street Railway Company, special authority conferred on the City of Covington to grant the right to use its streets for street railway purposes. The same is true of the Acts of the Legislature incorporating the Covington Street Railway Company and the appellee, The South Covington & Cincinnati Street Railway Company, and when any question has arisen, as it did with The Covington Street Railway Company, involving the respective rights of the City and said Company, the Court of Appeals looked to the act incorporating the Company for the authority of the City to act in the premises. It must not be overlooked that when the alleged franchise was granted to Abbott and Associates, December 23, 1869, neither the Covington & Cincinnati Street Railway Company nor appellee Company had been incorporated.

The case of WOODALL vs. SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, 137 KENTUCKY, 512 (decided February 1, 1910), throws no light on the question involved in the instant case. The compromise agreement made October 7, 1892, between the appellant and appellee was then in force, and the Court of Appeals did not consider, nor was it asked to consider, the question involved in the case at bar.

The Supreme Court of the United States in the case of PEOPLE'S RAILROAD vs. MEMPHIS RAILROAD, 10 WALL.,

38, had under consideration the rights and the powers of the City of Memphis to grant a franchise to use its streets for street railway purposes.

This Court said:

> "Power to make laws is vested in the legislature, under the constitution of the State, and it is very doubtful whether the legislative department can delegate to any other body or authority the power to grant such a franchise, as the exercise of that power involves a high trust created, and conferred for the benefit of those who granted it, and as the trust is confided to the legislature it must remain where it is vested until the constitution of the State is changed."

And on page 52:

> "Independently of those provisions, it is quite clear that the municipal authorities of the city possessed no such power as is supposed by the respondents. Such corporations are usually invested with the power to lay out, open, alter, repair and amend streets within the corporate limits; but the rule is well settled that by virtue of those powers, without more, they can not grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void.
>
> "Special powers are given to such corporations to lay out, open and repair streets as a trust to be held and exercised for the benefit of the public, from time to time, as occasion may require, and the general rule is, that those powers can not be delegated to others, nor be effectually abridged by any act of the municipal corporation without the express authority of the legislature.
>
> "Municipal corporations are doubtless invested with subordinate legislative powers to be exercised in the passage of ordinances for local purposes, connected

with the public good, but they are merely derivative, and are subject, at all times, to the legislative control."

The case of DAVIS against the MAYOR, &c., of NEW YORK CITY, 14 NEW YORK, 506, involved the validity of a grant of the right to use certain streets in New York City for street railway purposes. Page 517, the Court said:

"The power of the corporation over this subject is necessarily very large. It may lay out, open, alter, repair and amend, and regulate the streets, lanes, alleys and highways and may direct the draining, pitching and paving of them; and moreover, the Common Council are commissioners of highways, and they may discontinue and close up streets in the manner specified in the act. . . . .

". . . . . the resolution of the Common Council granting to the defendant Sharp and others the right to lay down a railroad in Broadway, was without the scope of the powers of the corporation, and was wholly unauthorized and illegal. . . . ."

And again, the case of MILHAU vs. SHARP, 27 N. Y., 611, involved the rights of the City of New York to grant a franchise. Briefly stated, the issue involved was substantially as follows:

The Common Council of the City of New York passed on the 29th of December, 1852, a resolution granting to the defendant, and those who might from time to time be associated with them, all of whom were designated as associates of the Broadway railway, the right or authority to lay a double track of railway in Broadway and Whitehall or State street from South Ferry to 59th street, and to continue the same from time to time along the Bloomingdale road to Manhattanville. Such tracks were required to be laid under the direction of the street commissioner in or near the middle of the street, and detailed the manner in which they were to be laid. The said associates

were to pay for ten years an annual license fee for each car; after that period it should pay such amount of licenses as the corporation with permission of the legislature should then prescribe; within a reasonable time the associates were to form themselves into a joint stock association which should be vested with all the rights and privileges granted by the resolution. The plaintiffs as property owners instituted the action to enjoin the use of the streets for street railway purposes immediately after the passage of the resolution. It was insisted that the street belonged to the corporation in fee simple absolute, and that Council had power to regulate the streets to lay down rails and to pass the resolution in question.

The Court said:

> "In the present aspect of this case, there are but two material questions presented for consideration:
>
> "1st: Had the Common Council authority to grant to the defendants the right to construct and maintain a railway through Broadway upon the terms specified in their resolution of December 30, 1853?
>
> . . . . . .
>
> "This case involves, not the general power of the corporation over the streets, but only the question whether the common council had authority to grant the particular privilege which the defendants claim. In determining that question, the provisions of the resolution granting those privileges must be regarded as indivisible. I allude only to the essential features of the plan. . . . . The provisions giving the right to lay the track of the railway, determining its location, width and the manner of construction, the quality of the cars, the times of their running, the motive power to be used, the maximum rates of toll to be charged, the amount of license fees to be paid, and the duration of the privelege granted are all parts of a single scheme which are incapable of separation. The whole scheme is valid, or no part of it. These privileges, whether they create a monopoly or not,

constitute a franchise . . . . . but neither the corporation nor the Common Council has been authorized to create a franchise of the character of that described in the resolution under consideration. It follows that the resolution relating to a subject not within the powers of the body passing it is merely void."

On page 641, the Court, continuing, said:

". . . . . and the powers of the corporation over the streets in many other respects would be abridged. Those powers were given to the corporation as a trust, to be held and exercised for the benefit of the public from time to time, as occasion might require, and they could neither be delegates to others nor effectually abridged by any act of the corporate authorities. (People vs. Kerr, 27 N. Y., 188; Presbyterian Church vs. Mayor, &c., 5 Cowen, 588; Coates vs. Mayor, &c., 7 *id.* 585; Gosler vs. Corporation of Georgetown, 6 Wheat, 593). Such trust is, in this respect, governed by the general principle that the duties of a trustee can not be delegated without express power for that purpose conferred by the author of the trust. (Hill on Trustees, 175, 540, Phil. Ed. 1846.)

On page 622 the Court concluded its answer to the first question, saying:

"The resolution is, therefore, void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street which the common council had no power to convey; and to divest the corporation of the exclusive control over the streets which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish."

"Exclusive control of the streets" conferred on the City of Covington legislative power and authority over the subject matter for the protection of the rights and interests of the general public. Granting to private persons a franchise to use the streets for street railway purpose, was in effect surrendering this right and vesting the same in private persons. The title to the streets and thoroughfares was vested in the City of Covington in trust for the public use and good, and the City Council could not surrender its trust or abridge its authority therein without express authority.

We respectfully submit, that the decree of the District Court should be reversed.

Respectfully submitted,

A. E. STRICKLETT,

Solicitor for City of Covington.

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No. 225.

IN THE SUPREME COURT OF UNITED STATES.

CITY OF COVINGTON, APPELLANT,

vs.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The question involved in this appeal is the duration of the franchises of the appellee Company to operate a street railway system upon, through and over the streets of the appellant City of Covington.

It is contended by the appellee Company that the various grants to it by the City of Covington were in perpetuity, while on the other hand appellant City of Covington contends the grants under which the Company is now and has been operating its system of street railway are limited to a term of years. There are a number of ordinances under which the Company claims its rights and franchises, and it is therefore necessary to state them in detail, in order to set forth clearly the basis of the contentions of the litigants.

Some of the grants were made to E. F. Abbott and associates, who conveyed them to a grantor of the appellee Company, while other grants were made to The Covington Street Railway Company, originally appellee Company's competitor, in the operation of street railway system in said city, which was afterwards acquired by appellee Company.

On the 15th day of December, 1864, the General Council of the City of Covington enacted an ordinance, entitled "An ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington," by the provisions of which the City of Covington provided that "any company organized for the purpose of laying down rails or running

street passenger cars to be drawn by horses or mules through the streets of Covington, shall be guided and regulated by the following rules and regulations, and such restrictions as Council may hereafter pass." This ordinance is the basis on which appellant relies to establish its contentions that the franchises exercised by the appellee Company are for a term of years, and because of its importance we have copied it at length in the foot-note.*

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*"AN ORDINANCE PRESCRIBING THE TERMS AND CONDITIONS OF STREET PASSENGER RAILROADS WITHIN THE CITY OF COVINGTON.

"SECTION 1. Be it ordained by the City Council of Covington, that any company organized for the purpose of laying down rails for running street passenger cars to be drawn by horses or mules through the streets of Covington, shall be guided, governed and regulated by the following conditions, and such restrictions as Council may hereafter pass.

"SECTION 2. No company shall be permitted to lay down a track through any of the streets of said city without first obtaining the consent of the City Council, designating the company to whom the privilege is granted and the streets through which said lines shall pass.

"SECTION 3. All tracks laid shall be of the gauge of five feet and two inches and of the most approved rail, which shall be not less than four-inch tram, and not more than three-quarter inch flange, the same to be laid according to the direction of City Council and in such manner as to be no impediment to the ordinary travel and use of the streets, with suitable bridges at all the gutters, so as to permit the flow of water under the same, and such grades as are or may be hereafter established by the City Council. Any company to whom any privilege be granted shall first enter into a good and sufficient bond in the penal sum of $50.00 with the City; said bond to be drawn by the City Attorney, and to be endorsed by not less than five responsible freeholders and residents of the city as sureties, to keep the streets between the rails in as good repair as the balance of the street, to the satisfaction of the City Council, and also that no motive power except horses and mules shall be used upon any street, and if any company or individual to whom any privileges shall be granted shall fail to keep that portion of the street occupied by their track in good and sufficient repair or shall refuse to pay into the city treasury the amount of tax or license fixed by Council for the privilege of using, as required by this section, the City Council shall have the right to prevent the use of said street or streets by removing the rails therefrom.

After the passage of this ordinance, the City of Covington made certain grants to persons and corporations to operate street railways in the city of Covington. The first of these was the Sherlock grant, which was assigned to The Covington Street Railway Company, which was incorporated by Special Act of the General Assembly, approved February 9, 1864; thereafter on the 15th day of August, 1865, the City of Covington and The Covington Street Railway Company entered into an agreement, whereby The Covington Street Railway Company was granted a franchise to construct and operate a street railway system upon and over the following streets, namely:

"SECTION 4. And upon the further condition that any company or individual to whom any privilege may be granted shall place and continue upon said street good cars with all the modern improvements for comfort and convenience of passengers, and that they run cars thereon as often as the public convenience may require.

"SECTION 5. And provided any such company or individual shall not charge more than five (5) cents for each passenger on each route.

"SECTION 6. And provided that no company or individual to whom any privilege may be granted shall assign or transfer their franchise in said road or roads without first obtaining the consent of the City Council thereto.

"SECTION 7. And provided further that the City of Covington shall not be held liable to any company or individual for the breakage of any sewer, gas or water pipe, or from any delay in the transportation of passengers that may be caused by the making of sewers or culverts or laying of water or gas pipes or the necessary repairing of the same, or from any other delay or damage that may be caused by fire or otherwise. But any such company or individual shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect or misconduct of their agents or servants in the management, construction or use of said track or street. And any such company or individual shall indemnify and hold the city harmless from any damage that may be claimed by property holders or by any person or persons on account of laying of said track or in the use or by reason thereof, or by running the cars thereon.

**"SECTION 8. Provided, any company or individual to whom privilege may be granted as aforesaid, shall within fifteen days after the award granting such privilege come forward and sign

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**This section of the ordinance as originally written and as it appears from the original now in the office of the City Clerk, is as follows:

Route I: Commencing at corner of Scott and Front Streets, thence south to Third Street, east on Third Street to Greenup Street, south on Greenup Street to Powell Street, east on Powell Street to Madison Avenue.

Route II: Commencing at corner of Scott and Front Streets, south on Scott Street to Third Street, west on Third Street to Madison, south on Madison to corporation line, with a double track on Madison from Eighth Street to Third Street.

Route III: Madison Street route to Sixth Street; west on Sixth Street to Washington Street, south on Washington Street to Pike Street, west on Pike to Banklick Street, south on Banklick Street to Fifteenth Street, east on Fifteenth Street to Madison Street.

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the proper contract agreeing to abide by these stipulations, and agreeing further to complete and put in operation and have cars running thereon not less than two and a half miles of road within twenty-four months after signing the necessary obligation, contracts and stipulations as required by this ordinance.

"SECTION 9. And be it further ordained that the following specifications regulating the running of street railroads in Covington be required of any company or individual taking out license under the provisions of this ordinance, viz.:

"1st. No car shall be drawn at a greater speed than six (6) miles an hour.

"2nd. While the cars are turning the corners from one street to another, the horses or mules shall not be driven faster than a walk.

"3rd. No car shall be allowed to stop on a cross walk or in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the streets.

"4th. When the conductor of any car is required to stop at the intersection of streets to receive or leave passengers, the cars shall be stopped so as to leave the rear platform slightly over the crossing.

"5th. The conductors and drivers of each car shall keep a vigilant watch for all teams, carriages, persons on foot, and

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"SECTION 8. Provided, any company or individual to whom privilege may be granted as aforesaid, shall within fifteen days after the (words 'passage of this ordinance' stricken out, and the word 'award' inserted) award granting such privilege, come forward and sign the proper contract agreeing to abide by these stipulations, and agreeing further to complete and put in operation and have cars running thereon not less than two and a half miles of road within twenty-four months after signing the necessary obligations, contracts and stipulations as required by this ordinance."

Route IV: Portion of Madison Street route, from Front and Scott Streets to Third and Madison Streets; west on Third Street to Main Street, south on Main Street to Pike, west on Pike Street to York Street.

Route V: Main Street route to Main Street, west on Third Street to Bullock, south on Bullock Street to Second Street.

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especially children, either on the track or moving towards it, and on first appearance of danger to such teams or persons or other obstructions, the car shall be stopped in the shortest time and space possible.

"6th. The conductor shall not allow ladies and children to enter or leave the cars while in motion.

"7th. Conductors shall announce to the passengers the names of the streets as the cars pass.

"8th. The cars after sunset shall be provided with signal lights.

"9th. The cars shall be entitled to the track, and any vehicle upon the track of said company shall turn out when any cars come up, so as to leave the track unobstructed when requested by the driver of any car.

"10th. Provided, that if any person or persons shall have cause to remove any iron safe or other large and heavy substance, they shall be allowed a sufficient time to load and unload the same without being liable or amenable for such obstruction.

"SECTION 10. Be it further ordained, the franchise for street railroads as provided for in this ordinance and according to the plan or roads as laid down in the schedule of the incorporators of the Covington Street Railroad Company presented to this Board with their petition now on file in the City Clerk's office be granted to any responsible company who will pay into the city treasury of Covington the largest bonus for the same and to the incorporators any expense they may have incurred in making a survey of the routes above referred to, together with maps and estimates not exceeding $100.

"SECTION 11. Be it further ordained that the City Clerk be instructed to advertise in the Cincinnati Gazette, Commercial Times and one paper in Pittsburg and Philadelphia until February 1, that sealed proposals will be received up until the first of February next, for the franchise above named, and that the same will be awarded to the highest and best bidder at the first meeting of Council thereafter.

"It being understood that the present incorporators propose to transfer their rights and privileges in and to the charter obtained by them for a street railroad in this city, to the company or individual offering the largest bonus for the above-mentioned franchise.

This grant by its terms and conditions was expressly limited to a period of twenty-five years. Before granting this franchise, the ordinance of December 15, 1864 (copied in the margin hereof) was amended so as to provide a means by which the plant of Covington Street Railway Company might be acquired by another in the event said company failed to acquire a franchise to operate the system of street railway after the expiration of the original period of twenty-five years. By a reference to the map on page 32 of the printed record, The Covington Street Railway Company lines are indicated in blue; it will be observed that it did not construct a line of street railway over all of the streets in its grant, but did construct and operate a street railway on Second Street from Greenup Street to Scott Street; Third Street from Greenup Street to Madison Street; Greenup Street from Second to Third Street; Scott Street from Second to Third; Madison from Third Street to Sixteenth Street.

On the 13th day of December, 1869, E. F. Abbott and associates filed an application or petition with the General Council of the City of Covington, in which they asked the City of Covington to grant them the privilege to construct and operate a street railway system over certain streets in the city of Covington. The Covington Street Railway Company, having received notice of the intended application for a franchise to operate a street railway, hostile to its interests, on the 13th day of May, 1869, filed a protest with the City Council (page 56, printed record) against the granting of the franchise which Abbott and associates were about to apply for, and questioned the right of the City to grant them a franchise, on the ground that it was a "violation of its purchased rights, aimed indeed at its great injury or intended destruction." On the 13th day of December, 1869, the City of Covington passed an ordinance granting to E. F. Abbott and associates a franchise to construct and operate a street railway system on and over certain streets. So much of this ordinance as is pertinent to the issue is copied in the foot-note.* See Next Page.

"SECTION 12. Be it further ordained that the company to whom this franchise is granted may have the privilege of repairing the streets between the rails by bouldering, when they may wish to do so.

"SECTION 13. This ordinance shall continue and be in force from and after its passage. All contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years."

The terms of this ordinance were confirmed by an agreement entered into between the City of Covington and Abbott and associates December 20, 1869, by the terms of which

". . . . . the said party of the first part (*i. e.*, the City of Covington) hereby agrees to grant unto the said party of the second part (*i. e.*, Abbott and associates) all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad. . . . . ."

(Words in parentheses ours.)

Appellee Company contends that the fact that the grant was silent as to duration, that the provision of the agreement quoted above confers on the grantees a franchise or right in perpetuity.

By an ordinance passed December 28, 1874, the grant to Abbott and associates under the ordinance of December 13, 1869, was modified by changing the route, so that it should extend west on Fourth Street to Main, on Main to Pike, east

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*"AN ORDINANCE AUTHORIZING A STREET RAILROAD ON CERTAIN STREETS.

"Be it ordained by the City Council of Covington that all the authority and right that the City of Covington has the capacity to, be and the same is hereby granted to E. F. Abbott, S. B. Redgate and J. C. Blick, their associates, successors and assigns, to construct, hold and operate a street railroad upon and along Scott Street from Fourth Street to Sixteenth Street; Sixteenth Street from Scott Street to Madison Street; Stevens Street from Sixteenth Street to Austin Street; and Austin Street from Stevens Street to Williams Street. In case The Covington Street Railway Company shall file with this Council a written agreement relinquishing their right of way on Greenup Street, from Fourth Street to Powell Street, and along Powell to Scott Street, in favor of Abbott and Company, then said Abbott and Company shall construct their road on Greenup Street instead of Scott Street, in accordance with their proposition for making the same on Scott Street; also to construct, hold and operate a street railroad upon and along Fourth Street from Scott Street to Bakewell Street; Bakewell Street from Fourth Street to Riddle Street; Riddle Street from Bakewell Street to Philadelphia Street, and on Philadelphia Street from Riddle Street to Lexington Pike.

"Said grant is upon condition and in consideration of the strict and faithful performance of said grantees of all the terms, stipulations and covenants contained in a certain written agreement made by and between said City and said grantees of even date herewith, and of record on the minutes of said Council; and said grant shall determine upon failure of such performance."

on Pike Street crossing Madison Street to Cooper Street; thence to Scott Street and north on Scott Street to the beginning.

By ordinance approved January 28, 1875, the City of Covington granted to Abbott and his associates authority to construct and maintain a line of street railway from Fourth Street north through market space and the alley immediately north thereof, to and across Second Street (page 76 of printed record); this ordinance gave the Abbott system a right of way to the Suspension Bridge, which spans the Ohio River. After Abbott and associates had acquired the first grant above set forth, The Covington & Cincinnati Street Railway Company was incorporated by special Act of the Legislature of Kentucky, approved January 28, 1870; thereafter on May 1, 1875, Abbott and Associates transferred by deed (page 71, printed record) the franchises acquired from the City of Covington, to The Covington & Cincinnati Street Railway Company; thereafter, The South Covington & Cincinnati Street Railway Company was organized by Special Act of the General Assembly approved January 28, 1876, and on the 20th day of December, 1876, The Covington & Cincinnati Street Railway Company by deed (page 76, printed record) conveyed all the rights and franchises to operate a street railway system in the city of Covington to The South Covington & Cincinnati Street Railway Company, the appellee herein. By Act of the General Assembly approved March 18, 1878, The South Covington & Cincinnati Street Railway Company was given the right to construct and maintain its line of street railway on Fourth Street from Scott Street to the Newport & Covington Bridge over the Licking River. It will be observed that in the Special Acts incorporating said companies, the right of "perpetual succession" was given each of them.

The City of Covington by ordinance approved June 8, 1882, authorized the appellee Company to contract with The Covington Street Railway Company for the use of the streets occupied by or over which it had the right to operate its street railway system. This ordinance contained the following provision:

> "And the consent of the latter Company (that is, The Covington Street Railway Company) having been obtained, The South Covington & Cincinnati Street Railway Company is hereby authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations and restrictions contained in the ORDINANCES regulating its right to the streets now occupied by said South Covington & Cincinnati Street Railway Company." (Page 80, printed record.)

In July, 1882, a contract was entered into between The Covington Street Railway Company and The South Covington & Cincinnati Street Railway Company (page 34 of printed record) by the terms of which The South Covington & Cincinnati Street Railway Company was given the right or permission by The Covington Street Railway Company to construct and operate a street railway system over the streets specified in the ordinance approved August 15, 1865, granting it the franchise referred to above over Routes 1, 2, 3, 4 and 5. This contract contained the following provision:

> "And the said party of the second part, for the privileges herein granted, hereby covenants to pay at the end of each and every year, for a period of eight years, beginning August 15, 1882, the sum of two hundred and fifty dollars to the City of Covington, said City having duly authorized said party of the second part by ordinance approved June 8, 1882, to use the streets mentioned in said routes for street railway purposes, and the said party of the first part having obligated itself to pay the said sum of two hundred and fifty dollars annually until August 15, 1890, to said City in consideration of the right of way over said streets, as will appear by reference to said agreement between said party of the first part and said City, dated August 15, 1865, the payment of which sum for the year ending August 15, 1883, and annually thereafter, until the expiration of the said term, is assumed by said party of the second part."

On the 20th day of March, 1883, the Master Commissioner of the Kenton Chancery Court conveyed to The South Covington & Cincinnati Street Railway Company all the rights, titles and interests that The Covington Street Railway Company had in or to rights or privileges for a period of twenty-five years, over the streets specified in said contract bearing date of August 15, 1865. By said contract, deed and ordinance approved June 8, 1882, The South Covington & Cincinnati Street Railway Company acquired the rights and titles and interests of The Covington Street Railway Company in or to the Sherlock franchise, and thereafter it took over and operated the system formerly owned by The Covington Street Railway Company, and has since operated the only street railway system maintained in the city of Covington.

On the 28th day of August, 1884, The Council of the City of Covington granted The South Covington & Cincinnati Street Railway Company "the right to extend a double track on Madison Street from its terminus between Twelfth and Thirteenth Streets, southwardly to the terminus of the Madison

Street route or corporation line. The ordinance contained the following provision:

> "Said company shall have the right to hold, use and enjoy said double track so extended so far as the City has control over said portion of Madison Street, south of Twelfth Street, subject, however, to the terms, conditions, limitations, restrictions, burdens, duties and liabilities as said South Covington & Cincinnati Street Railway Company now holds or uses the tracks on the same route north of Twelfth Street."

On the 7th day of July, 1887, the City of Covington granted to The South Covington & Cincinnati Street Railway Company the right to construct a line of street railway over the following streets, to-wit:

> "Commencing at the connection with the present track on Powell and Greenup Streets and running eastwardly on Powell to Rickey Street; thence southwardly on Rickey Street to Oliver Street; thence eastwardly on Oliver Street to Edwards, south on Edwards Street to Seventeenth Street, west on Seventeenth Street to Scott Street; north on Scott to Powell Street, and connecting with the present tracks at the intersection of Powell and Scott Streets, upon the same terms and conditions upon which it holds and operates its present line of street railway."

This ordinance contains the following provision:

> "The rights and privileges herein granted shall expire and terminate as the rights, privileges and franchises now exercised by said Street Railway Company, and under which said company is now operating, and shall not be construed as extending in any way, for any length of time, the rights, privileges and franchises heretofore granted to said Street Railway Company. . . . . "

On the 5th day of August, 1889, an ordinance was passed and approved, giving the appellee Company the right and privilege to operate its system of railway by the use of electricity as a motor power, instead of horse power. This ordinance contained the following provision:

> ". . . . . And as the length of time during which said South Covington & Cincinnati Street Railway Company is now authorized to operate its lines of railway over the streets of the City of Covington is a matter of disagreement between said Street Railway Company and the City of Covington, said City claiming the time will soon expire, and the said company claiming the time is not limited, it is expressly under-

stood that nothing in this ordinance shall be construed, nor shall it give to the said Railway Company, any further or longer time than it now has to operate its lines."

On the 3rd day of January, 1891, the City of Covington granted The South Covington & Cincinnati Street Railway Company the right to lay and maintain its tracks on Madison Avenue from State Street to Mullins Street, for the purpose of connecting its present system of street railway on Madison Avenue with the car depot to be erected at the northwest corner of State and Madison Avenue. This ordinance contained the following provisions:

"The rights, privileges and franchises herein granted shall expire and terminate as the rights, privileges and franchises now exercised by said Street Railway Company and under which said company is now operated, and shall not be construed as extending in any way or for any length of time the rights, privileges and franchises heretofore granted to said Street Railway Company, either as to any streets over which it now operates or may have the right to operate, or as to the streets herein designated."

The appellee, The South Covington & Cincinnati Street Railway Company's, rights or privileges to operate a street railway system in the city of Covington were acquired from two sources: namely, the Sherlock grant, which was acquired and used by the Covington Street Railway Company, and the Abbott grant, which was originally used by The Covington & Cincinnati Street Railway Company. The Sherlock grant relates to or covered the following streets:

Scott Street from Front Street south to Third Street.
Third Street from Greenup Street to Bullock, now Crescent.
Greenup Street from Second Street to Powell Street.
Second Street from Scott to Greenup Street.
Madison Avenue from Third Street to corporation line.
Main Street from Third Street to Pike Street.
Pike Street from Washington Street to Banklick Street.
Sixth Street from Madison to Washington; and
Washington Street from Sixth Street to Pike Street.

These streets are the ones referred to in this brief and in the printed record as Routes 1, 2, 3, 4 and 5, and the grant is expressly limited to a period of twenty-five years.

The Abbott grant conferred the privilege to construct and operate a street railway in the city of Covington over the following streets:

Scott Street from Fourth Street to Sixteenth Street.
Fourth Street from Covington & Newport Bridge to Main.
Main Street to Pike Street, Pike Street to Madison.

Sixteenth Street from Stephens Street to Madison Avenue.
Stephens Street, now Garrard Avenue, from Sixteenth to Austin.
Austin Street to Williams Street. 1890

By ordinance approved October 20, ~~190~~, with the various amendments thereto, the City of Covington granted to The Covington, Cincinnati & Rosedale Railway Company the right to construct, operate and maintain double or single tracks of street railway in the city of Covington, over the following streets:

Eleventh Street from Russell Street to Greenup Street.
Twelfth Street from Greenup Street to Rickey Street.
Russell Street from Robbins Street to Twelfth Street.
Robbins Street from Madison Avenue to Russell Avenue.
Twelfth Street from Russell to Holman Street.
Holman Street from Twelfth Street south to corporation line.
Thirteenth Street from Holman Street to Russell Avenue.

The grant of the Rosedale Company is expressly limited to a period of fifty years, and can not be assigned except by consent of the City of Covington. This grant has never been acquired by the appellee Company. But few years had elapsed after appellee Company had acquired the Sherlock grant until there arose between the City of Covington and the Street Railway Company a dispute or controversy as to when its rights, franchises and privileges to use the streets of the city, in the operation of its street railway system, would expire. This was expressed in the ordinance approved August 5, 1889, which authorized the use of electricity as a motor power. The controversy between the City and the Street Railway Company as to their respective rights finally terminated in a suit being filed in the Circuit Court of the United States for Sixth Judicial District of Kentucky, by The South Covington & Cincinnati Street Railway Company, against the City of Covington, and also by W. A. Goodman, Trustee, against the City of Covington, to have determined the respective rights or contentions. On the 7th day of October, 1892, an agreement was reached in these actions, which was set out in ordinance passed by General Council of the City of Covington, approved October 7, 1892, which is found on pages 96 to 103, both inclusive, of the printed record. Under the provisions of this agreement, the parties were to prosecute the suits to a final judgment to determine finally the questions involved between the City of Covington and appellee Company, before the expiration of the twenty years next ensuing, for which period the City agreed to postpone any action looking to the sale of the franchise to operate a street railway system over its streets. The suits in question were thereafter dismissed without prejudice and

no action was taken until the City passed an ordinance approved July 14, 1913, providing for the sale of the franchise over all of the streets occupied and used, not only by appellee Company, but by the Rosedale Company also; thereafter, the appellee Company filed its Bill in Equity in the United States District Court for Eastern District of Kentucky, seeking to have the City of Covington restrained and enjoined from attempting to sell the franchise to operate a street railway upon and over its streets. Upon a hearing, the District Court of United States for Eastern District of Kentucky granted a preliminary injunction, which on final submission of the case was made permanent, and the City of Covington has appealed to this Court seeking a reversal of the judgment of the District Court on the following assigned errors:

1. That the United States District Court for the Eastern District of Kentucky erred in holding that the plaintiff had a valid and existing perpetual franchise for the operation of street railway lines upon and along the streets set forth in the decree.

2. That the United States District Court for the Eastern District of Kentucky erred in adjudging that the City of Covington, its officers and agents and each of them be perpetually enjoined from carrying out the terms of the Covington City Ordinance of July 14, 1913, mentioned in the bill.

3. That the District Court of the United States for the Eastern District of Kentucky erred in perpetually enjoining the defendant from interfering or attempting to interfere with plaintiff in the maintenance and operation of its street railway lines upon defendant's streets mentioned under error No. 1 herein.

4. That the United States District Court for the Eastern District of Kentucky erred in perpetually enjoining the defendant from acting in any such form or manner as would alter, impair, limit, infringe or destroy the title of plaintiff in its grants, rights and franchises.

In considering this case, a determination of the error first assigned concludes for all purposes the whole case, since appellant City of Covington insists that appellee Company's franchise to use its streets for street railway purposes has expired; while on the other hand appellee, The South Covington & Cincinnati Street Railway Company insists that it has a valid existing franchise in perpetuity.

The City of Covington contends:

FIRST: That the ordinance passed by Council December 15, 1864, is a general ordinance, limiting all grants subsequently made to a period or term of twenty-five years, except where a different term was expressly provided, as in the grant to the Rosedale Company.

SECOND: The Council of the City of Covington had no power to grant a right, privilege or franchise to use its streets for street railway purposes under the general power of "exclusive control of the streets, sidewalks, lanes, alleys, market spaces and other public places," conferred on it by the Act of the Legislature approved March 2, 1850.

ARGUMENT.

PROPOSITION I: THAT THE ORDINANCE PASSED BY COUNCIL DECEMBER 15, 1864, IS A GENERAL ORDINANCE, LIMITING ALL GRANTS SUBSEQUENTLY MADE TO A PERIOD OR TERM OF TWENTY-FIVE YEARS, EXCEPT WHERE A DIFFRENT TERM WAS EXPRESSLY PROVIDED, AS IN THE GRANT TO THE ROSEDALE COMPANY.

The only question involved in this case is one of construction and intent. By act of the General Assembly of the Commonwealth of Kentucky, approved March 2, 1850 (see Acts 1849-1850, page 239), control of the streets and thoroughfares of the city of Covington was vested in Council. Section 2 of Article 1 of said Act is as follows:

> ". . . . . that all the streets, roads, lanes, alleys, commons, market spaces, public squares and grounds, and public landings, in said city, be and the same are hereby vested in the city, and where the owner of any land, within said corporation, shall lay out any street, lane, alley, or any ground for public use, and so dedicate the same, it shall immediately vest in the city; and the authorities thereof shall have exclusive control over the same for the public use and good."

Section 19, Article 2, of said Act further provides:

> "The Council shall have exclusive power to establish and regulate markets and market spaces, wharves and docks, and to fix the rates of wharfage and other fees for the use thereof. . . . . They shall have also the exclusive control of the streets, sidewalks, lanes, alleys, market spaces and other public grounds within the corporate limits and shall cause the same to be kept clean and in repair."

Conceding for the purpose of arguing this proposition, that the Council had the power under the provisions of its charter above quoted to grant the privilege or franchise to operate a street railway system upon or over its streets, it follows that Council had the right to impose any condition, limitation or enact a regulatory measure, as a condition precedent to such grant or privilege, and such conditions, limitations or regulations became as effectively a part of the grant, as if the same

were copied into the contract at length. The City of Covington contends that the ordinance passed December 15, 1864, was a restrictive or regulatory measure, general in its terms, and applicable to all grants to operate a street railway system subsequently made, except in such cases where the intention was clearly expressed to the contrary.

At this point, we may call the attention of the Court to the ordinance passed and approved October 20, 1890, and the amendment thereto, whereby the privilege or franchise to operate a street railway system upon and over certain streets of the city of Covington was granted to The Covington, Cincinnati & Rosedale Railroad Company, for the express term of fifty years. Under the provisions of the ordinance approved July 14, 1913, the City attempted to sell the privilege to operate a street railway line or lines over the identical street now occupied by the lines of said Rosedale Company. One of the provisions of the grant to the Rosedale Company is that its rights could not be assigned without the consent of the City of Covington in writing. It does not appear in the record that the appellee Company ever acquired these rights, nor that the City had consented to the same. Therefore, so far as the rights to those streets are concerned—to-wit, Eleventh Street from Russell Street to Greenup Street; Twelfth Street from Greenup to Rickey Street; Robbin Street from Russell to Madison Avenue; Russell Street from Robbin to Thirteenth Street; Twelfth Street from Russell to Holman Street; Holman Street from Twelfth Street to corporation line; Thirteenth Street from Holman Street to Russell Street—are vested in the Rosedale Company, which is not a party to this action. We may say, however, that the City has no right, at the present time at least, to proceed to sell the rights or franchises of this company until the expiration of said term of fifty years, the period for which said grant was made to the Rosedale Company.

But an entirely different question presents itself in reference to the other streets. The appellee Company acquired the right to operate a street railway system over certain streets of the city by purchase from The Covington Street Railway Company. These rights were originally those granted to Sherlock and associates, and which were expressly granted for a fixed term of twenty-five years. The original grant to Abbott and associates relates to certain streets, none of which, excepting Fourth Street, is now occupied or used for street railway purposes by appellee. After The South Covington & Cincinnati Street Railway Company had acquired, by contract and purchase, the use of or the franchise to operate a street railway system over the streets occupied by The Covington Street Railway Company, the City Council then passed an ordinance authorizing the appellee

". . . . . to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations and restrictions contained in the ordinances regulating its rights to the streets now occupied by said South Covington & Cincinnati Street Railway Company."

This provision sends us back to the language of the original grant to Abbott and associates, and the regulations imposed by the general ordinance of December 15, 1864. We refer to the ordinance of December 15, 1864, because the ordinance confirming in the appellee Company the franchise and privilege conferred on and enjoyed by The Covington Street Railway Company, and acquired by appellee, refers to the "ORDINANCES regulating its rights to the streets now occupied by said South Covington & Cincinnati Street Railway Company." Therefore, the duration of the franchises and privileges now held and enjoyed by the appellee Company depends upon the construction of the language used in the original grant to Abbott, and the relation of this language to the ordinance passed December 15, 1864, printed in full in the margin hereof.

Going back to the language used in the Abbott grant, the agreement contains the following:

". . . . . the said party of the first part (that is, the City of Covington) hereby agrees to grant unto the said party of the second part all the rights and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad . . . . ."

Appellee contends, and the District Court held, that the agreement which was made pursuant to the ordinance of December 13, 1869, confers on the appellee a grant or franchise in perpetuity. In construing the ordinance in question, the Court, if possible, should arrive at the intention, purpose and object of the Council. It is elementary, that where there are several legislative acts on one subject, they constitute one system and must be construed together. So the ordinance passed December 15, 1864, and the ordinances subsequently passed granting franchises to operate a street railway system are in pari materia, and must be construed together in the absence of inconsistent or contradictory provisions.

The learned Judge of the District Court, in considering the question as to whether the ordinance passed December 15, 1864, is general, so as to limit subsequent grants, said:

"Taking the ordinance to be as it is claimed to have been, *i. e.*, as intended to limit subsequent grants of street railway franchises, it must be conceded that the Council of 1864 had no power to limit the action of the Council of 1869 and later years, and that in determin-

ing the intent of the grant made by the later Council it is its intent, and not that of the former Council, which controls."

While it is true that the ordinance of 1864 did not have the effect to limit the power or action of the Council of 1869 in respect to its right to repeal, it is equally true that the ordinance passed by the Council of December, 1864, was binding on subsequent Councils until it was expressly repealed; and it is likewise true that it was binding upon all corporations and persons engaged in the business regulated by such ordinance. Subsequent Councils could not, by contract or other subterfuge, avoid the provisions of this ordinance; the Council of 1869 had only the power to repeal it. The Court of Appeals of Kentucky decided this question about the time the grant in question was made to Abbott and associates. In the case of LOUISVILLE CITY RAILWAY COMPANY vs. CITY OF LOUISVILLE, 8 BUSH, 415, the Court of Appeals of Kentucky, by His Honor, Judge Wm. Lindsay, afterwards United States Senator from Kentucky, said:

> *"In determining the legal effect of contracts made with municipal corporations it must be borne in mind that they have no power to limit their legislative discretion by covenant. They may contract as individuals, but their legislative enactments must of necessity have the same effect upon their individual contracts as upon those of other persons, artificial or natural, or of the general public.* The company derives its right of way over certain of the streets and highways of the City of Louisville by contract with the city government. The city through its municipal officers holds to some extent the prerogative of government. The General Assembly of the Commonwealth has delegated to it for the common benefit the power to regulate and control these streets and highways. This power the city can not refuse to exercise when public necessity or convenience demands that it shall be done, nor can it be allowed to excuse its failure in this particular upon the ground that it has by contract deprived itself of the right to act. (Presbyterian Church vs. City of New York, 5 Cowen, 532; Vanderbilt vs. Adams, 7 Cowen, 349; Stuyvesant vs. New York, *ibid.*, 585; Cooley's Constitutional Limitations, 196.)"
>
> (Italics ours.)

In determining whether the ordinance in question was general, we may resort to the history of the Act, the report of the Committee, the introduction of amendments, the title, and the primary meaning of the words used by the legislative

authority. The rule here contended for seems to be well established. Volume 36, CYC, 1138, states the general rule to be:

> "Where the language of a statute is ambiguous, its meaning may frequently be ascertained by resort to the history of the passage through the Legislature. While the authentication of an enrolled bill by the signatures of the presiding officers of the two legislative houses is conclusive evidence of its enactment, yet for the purpose of interpreting the legislative will resort may be had to the history of the statute as found in the journals of the two legislative bodies, and also to the original bill with the amendments noted thereon. . . . . Both the debates, however, and the reports of committees may be consulted for the purpose of ascertaining the general object of the legislation proposed and the evils sought to be remedied."

This rule is sustained by the Supreme Court of United States in the case of HOLY TRINITY CHURCH vs. UNITED STATES, 143 U. S., 457.

It must be borne in mind that prior to November 10, 1864, the City of Covington had no street railway system, nor had any persons or corporations applied for a franchise to operate a street railway system within its limits.

On that date, certain citizens of Covington representing a corporation addressed to the President and members of the City Council of Covington a communication advising the City Council that they had obtained from the Legislature of the State of Kentucky a charter to operate a street railway system in the city of Covington, and requested that they be granted the right to lay down tracks in and upon certain streets. This communication was referred to a committee, which December 1, 1864, reported that the prayer of the petitioners be granted, which was concurred in, and the Committee on Law, in conjunction with the City Attorney, was instructed to report an ordinance granting the Street Railroad Company the franchise asked for in their petition. Thereafter on December 15, 1864, the Committee on Law reported as follows:

> "Gentlemen: The Committee on Law, to whom was referred the report of the Special Committee on Street Railroads, with instructions to report an ordinance defining the obligations of any company or individual to whom privilege may be granted to use the streets of the city for street passenger railroad purposes, and the regulation by which any such company or individual shall be governed in running the same, would ask leave to introduce for that purpose the following ordinance." Signed by Mr. Condell.

The minutes of the meeting of Council show the following:

> "Mr. Condell, Chairman of Committee on Law, to whom was referred the report on street railroad with instructions to report an ordinance, reported an ordinance presenting the terms and conditions of street passenger railroads within the city of Covington, which had its first reading when on motion the Council resolved itself into a committee of the whole, Mr. Shutt in the chair, for the purpose of considering the above ordinance. The Committee arose and through their chairman reported that they had examined the ordinance carefully and adopted it section by section, and ask for your concurrence and adoption. On motion the report of the committee was received and adopted and the ordinance was read the third time and adopted unanimously."

The learned Judge of the District Court, in his opinion in reference to the reports of these Committees, said:

> "On November 10, 1864, through its incorporators, it (The Covington Street Railway Company) made application to defendant's Council for a grant to it of the "right of way to lay down" tracks along certain specified streets, "with the privileges necessary to operate the same." This application was referred to a special committee, which December 1, 1864, reported in favor of granting the application, with a certain change in the route set forth therein, and on December 5, 1864, the report was approved, and the Committee on Law, in conjunction with the City Attorney, was instructed to report an ordinance granting the franchise asked for, agreeable to the report of the Committee. This Committee reported, and Council passed an ordinance December 15, 1864. In view of the preceding steps, one would expect the ordinance so reported and passed to be an ordinance granting to that company the franchise applied for, and they indicate that Council regarded such was its character."
>
> (Words in parentheses ours.)

While it is true that the Committee on Street Railroads, to whom was referred the application of The Covington Street Railway Company, reported that the prayer of the petition should be granted, which report was referred to the Committee on Law and the City Attorney, with instruction to report an ordinance granting the Street Railway Company the franchise asked for, but as a matter of fact, the Committee on Law and the City Attorney reported an ordinance general in its terms and provisions, and their signed report shows that they so

considered it. In reporting this ordinance, the Committee says it reports:

> "An ordinance defining the obligations of any company or individual, to whom privilege may be granted to use the streets of the city for street passenger railroad purposes, and the regulation by which any such company or individual shall be governed in running the same . . . . . would ask leave to introduce for that purpose the following ordinance."

Thereupon, Council immediately resolved itself into a Committee of the Whole and discussed the ordinance, and adopted it section by section, and when the Committee arose, it reported to Council through its Chairman that they had examined the ordinance carefully adopted it section by section, and ask for its concurrence and adoption. The record (printed record, page 47) shows that the ordinance reported by the Committee of the Whole was unanimously adopted. Now, if the Committee on Law and the City Attorney exceeded their authority and reported an ordinance different from that which Council had instructed them to report, when Council adopted the ordinance reported by the Law Committee, then it became the act of Council and not the Special Committee. We also find that Section 8 of the ordinance reported provided that the individual or company should within fifteen days "after the passage of this ordinance" sign a contract, but Council amended this section by striking out the words "passage of this ordinance" and substituted the word "award," so that the section provided:

> "Any company or individual to whom privileges may be granted as aforesaid, shall within fifteen days after the 'award' granting such privilege . . . . ."

It is perfectly logical to conclude that if the words "passage of this ordinance" had been permitted to remain, clearly it would have indicated that they had in mind binding a certain company by the ordinance in question; but when they substituted the word "award" for the words "passage of this ordinance" it appears with equal force and clearness that they not only intended to bind the particular company who had petitioned Council for a franchise to operate a street railway system, but any and all other companies making application for the same privilege. Again referring to the title of this ordinance, we find it to be "An ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington." The title also indicates with sufficient clearness that the ordinance is not for the purpose of prescribing the terms and conditions for a particular street passenger railroad, but all street passenger railroads which would make application or be granted a franchise subsequent to the passage of

this ordinance. It was passed for the purpose of defining the terms and conditions on which they might operate; one of the terms and conditions of this ordinance is:

> "All contracts made under the provisions of this ordinance shall be for a term and period of twenty-five years."

Applying to the language of the ordinance itself, we find the terms not relating to a particular company or individual, but throughout the entire ordinance we find general terms, as "any company" in section two; "any company" in section three; section four, "any company or individual;" section five, "any such company or individual;" section six, "any company or individual;" section seven, "any company or individual;" section eight, "any company or individual;" section nine, prescribing the specifications regulating the running of street railroads in Covington, "be required of any company or individual;" section ten refers to "street railroads." In section ten is made the only reference in the ordinance to the Covington Street Railway Company, and it merely refers to the schedule of that company as being one of the franchises that may be awarded under the ordinance. It seems to me that when we consider all the propositions embraced in the rule for the construction of statutes or ordinances, and apply them to this ordinance, we are forced to conclude that Council of the City of Covington intended the ordinance passed December 15, 1864, to be general in its operation.

Dillon on Municipal Corporations, 5th Edition, Vol. 1, Section 142, said:

> "But to make a statute applicable to a class a general law, it must be framed in general terms, restricted to no locality, operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. The test of the generality of a statute is the appropriateness of its provisions to the objects that it excludes. It must exclude none whose conditions and wants render such legislation equally necessary or appropriate to them as a part of the class. And although the number of persons upon whom a general law may have any direct effect may be very few, it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides . . . . . A law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. It is special when it confers particular

privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

In the case of PEOPLE vs. CENTRAL PACIFIC RAILROAD COMPANY, 105 CALIF., 576, the Court said:

"The distinction between a special and a general law may not be capable of being formulated in a definition which is exhaustive of the subject and applicable to every case, and the question may be better determined upon a consideration of each particular case presented for its application by taking into view the subject and character of the law, as well as the individuals upon whom it is to operate."

That many of the provisions of the ordinance of December 15, 1864, are identical with the provisions of the grant to Abbott and associates, does not militate against the position of the City, that Abbott and associates' franchise is subject to the general ordinance. The rule is that the general ordinance would be repealed only in the instance where the Abbott grant conflicts irreconcilably with the ordinance of December 15, 1864, and to that extent only is it repealed.

The rule in DILLON on MUNICIPAL CORPORATIONS, VOL. 2, section 584, note 2, in reference to repeal by implication, sustains appellant and is as follows:

"An ordinance will only repeal an earlier ordinance by implication when the provisions of the later ordinance are necessarily or plainly inconsistent with and repugnant to those of the earlier. Repeals by implication are not favored; and if possible, construction will be adopted by which both ordinances may stand." Chicago vs. Quimby, 38 Ill., 274; People vs. Harrison, 185 Ill., 307. "Thus an ordinance is not repealed by a subsequent ordinance relating to the same subject matter which without altering the provisions of the earlier ordinance provides regulations in regard to the subject matter which are not inconsistent with the first ordinance." Ex parte Hinkle, 101 Mo. App., 104.

The general rule stated in "CYC." Vol. 36, page 1071, is as follows:

"But the repeal of statutes by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes

must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. It follows that where the intention not to repeal is apparent or manifest from an act there is no room for repeal by implication, or the application of rules regarding implied repeal."

This is a universal rule and is recognized by the Federal as well as the State Courts. But the learned Judge of the District Court, in referring to the action of the Council of 1864, and the Council of 1869, said:

". . . . . in determining the extent of the grant made by the latter Council, it is its intent and not that of the former Council which controls . . . . ."

But it seems to me that the correct rule is that if it was the purpose and intent of the Council of 1864 to enact an ordinance general in its operation, it, upon its passage, became the "permanent rule of action" and had the same binding force upon the inhabitants of the city of Covington as the general laws of the State upon the citizens at large. DILLON on MUNICIPAL CORPORATIONS, 5th Ed., Sec. 573, lays down this rule:

"Although the proposition that the Legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the *Legislature to delegate to municipal corporations the power to make by-laws and ordinance, with appropriate sanctions, which, when authorized, have the force in favor of the municipality and against the persons bound thereby, of laws passed by the Legislature of the State.* . . . ." (Italics ours.)

In note 1 to Section 573, page 902, this proposition is sustained:

"A City Council is 'a miniature general assembly, and their authorized ordinances have the force of laws passed by the Legislature of the State.' Per Scott, J., Taylor vs. Carondolet (forfeiture clause in lease), 22 Mo. 105; St. Louis vs. Foster, 52 Mo. 513. In Hopkins vs. Swansea, 4 M. & W., 621, 640, Lord Abinger said: 'The by-law has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an act of parliament has upon the subjects at large.' Valid ordinances of corporations are as binding on the corporators and inhabitants of the place as the general laws of the State upon the citizens at large. Milne vs. Davidson, 5 Martin, n. s. (La.), 409. And therefore it has been held that contracts between the inhabitants of a city, in violation of the express provisions of a valid ordinance of a municipal corporation, are illegal, and can not be enforced. . . . ."

The ordinance of December 15, 1864, having the sanctity and force of a legislative act, was in force at the time of the grant to Abbott and associates, December 23, 1869, and became a part of the contract between the City of Covington and Abbott and associates, as much so as if its provisions were incorporated in the agreement, except to the extent only where the provisions conflict.

We may call the attention of the Court to another fact in the history of the Abbott grant. May 13, 1869, the Covington Street Railway Company addressed a letter to the President and members of the City Council, in which, after reciting the history of its franchise, proceeded to state:

> "The Company has learned from the newspapers that individuals have proposed and Council has under consideration the granting of a new route now hostile to the interests of this Company, violative of its purchased rights, aimed, indeed, at its great injury and intended destruction. . . . . "If the granting of the pending application be not a clear violation in law of the right sold by the City to this Company, would it not be a breach of that perfect good faith and fair dealing that ought to exist? . . . . ."

The whole tenor of this protest was to question the right of the City to grant to Abbott and others the franchise hostile to it; but nevertheless Council made the grant to Abbott and associates, in which the City agreed

> ". . . . . to grant unto said party of the second part all the right and authority that the said party of the first part has the capacity to grant."

Reviewing the conditions presented to Council at the time this grant was made, we have a street railway company actually in operation, protesting against the grant to Abbott being made, on the grounds that it was a breach of "good faith and fair dealing" and "violative of its purchased rights." In making this grant, Council used the words "all the right and authority that said party of the first part had the capacity to grant," because it was a question then whether Council could grant any privileges or rights to Abbott and associates, by reason of the fact that The Covington Street Railway Company was contending that such grant would be in violation of "its purchased rights," or, in other words, that it had an exclusive franchise. But be that as it may, there was no expressed or implied repeal in the Abbott grant of the provisions of the general ordinance of December, 1864. It may be contended, and indeed it was decided by the District Court, that the construction of the Abbott grant alone is involved in this case; but we contend, on the other hand, that Abbott grant and the ordinance of December 15, 1864, should be construed together, as they are

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in pari materia. The terms "all the right and authority" relate only to a right to use the streets for street railway purposes, consistent with the right of the general public, and does not relate to the duration of the franchise, which is restricted or defined by general ordinance.

It may also be contended that the only restriction or limitation as to the duration of the franchise granted to Abbott and associates is that the "grant shall determine upon failure of such performance." If Abbott and associates had failed or refused to exercise the privileges granted to them, they certainly would not contend that the right vouchsafed them in the grant would not be forfeited by such failure. The contract was a mutual one. The City had given them a right to use the streets, conditioned on their performing a public service, and non-performance alone was sufficient to terminate the contract, and this provision relates only to that phase of the contract, and has no reference whatever to its duration.

That all contracts whereby franchises are granted are to be construed most strongly against the grantee and in favor of the public, is the universal rule in doubtful cases. It, however, may be contended that this rule can not apply in the instant case, as the grant to Abbott and associates contains no ambiguous or inconsistent language.

The learned Judge of the District Court concluded that the grant was in perpetuity, by the process of elimination of the general ordinance, and proceeded to the consideration of the Abbott grant, and decided that appellee's franchise was in perpetuity; but we contend that, if it is not perfectly clear, in light of the contemporaneous history of the Abbott grant, and its relation to the ordinance passed December 15, 1864, that it is limited to a period of twenty-five years, its duration is so enmeshed, by reason of its said history and the said ordinance, in doubts, as to invoke the rule applicable to doubtful cases.

The Supreme Court of the United States, in the case of BLAIR vs. CHICAGO, 201 U. S., page 400, said:

> "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. Pierce on Railroads, 491; New Orleans &c. Railroad Company vs. City of New Orleans, 34 La. Ann., 429,

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447. 'Words of equivocal import,' said Mr. Chief Justice Black in Pennsylvania Railroad Company vs. Canal Commissioners, 21 Pa. St. 9, 22, 'are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the Legislature.' 'The just presumption,' says Cooley in his work on Constitutional Limitations, 7th ed., p. 565, 'in every such case is that the State has granted in express terms all that it designed to grant at all;' and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine and should be vigilantly observed and enforced.'

"Since the decision of the Dartmouth College case, 4 Wheat, 518, this Court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the State or municipalities acting under State authority. Concurrent with this principle and to be considered when construing an alleged grant of this character is the equally well-established rule which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of Charles River Bridge vs. Warren Bridge, 11 Pet., 420, and has been uniformly applied in many subsequent cases in this court. In Perrine vs. Chesapeake & Delaware Canal Co., 9 How., 172, 192, the same eminent Chief Justice, speaking for the Court, said, 'The rule of construction in cases of this description . . . . . is this—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained or unusual construction, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' In the case of The Binghamton Bridge, 3 Wall, 51, 75, it was said: 'The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the

instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.'

"This principle has been declared axiomatic as a doctrine of this Court. Fertilizing Company vs. Hyde Park, 97 U. S., 659, 666. In Slidell vs. Grandjean, 111 U. S., 412, it is declared a wise doctrine; 'it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies. . . . . ."

The Supreme Court of United States in the case of CLEVELAND ELECTRIC RAILWAY CO. vs. CLEVELAND, 204 U. S., 129, said:

". . . . . The rules of construction which have been adopted by courts in cases of public grants of this nature by the authorities of cities are of long standing. It has been held that such grants should be in plain language, that they should be certain and definite in their nature, and should contain no ambiguity in their terms. The legislative mind must be distinctly impressed with the unequivocal form of expression contained in the grant, 'in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislatures with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. . . . . ."

To the same effect is the case of RUSSELL vs. SEBASTIAN, 233 U. S., 195:

"In support of this view, the established and salutary rule is invoked that public grants are to be construed strictly in favor of the public; that ambiguities are to be resolved against the grantee. Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 546, 549; Slidell vs. Grand Jean, 111 U. S., 412, 437; Detroit Citizens' Rwy. Co. vs. Detroit Railway, 171 U. S., 48, 54; Knoxville Water Co. vs. Knoxville, 200 U. S., 22, 34; Blair vs. Chicago, 201 U. S., 400, 471. It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn

by interested parties and that it serves to frustrate efforts through the skillful use of words to accomplish purposes which are not apparent upon the face of the enactment. Dubuque & Pacific R. R. Co. vs. Litchfield, 23 How., 66, 88; Slidell vs. Grand Jean, *supra;* Blair vs. Chicago, *supra.*"

Therefore, the ordinance passed by Council of the City of Covington, December 15, 1864, was general, the effect of which is to limit the grant to Abbott and associates to the term of twenty-five years. In this connection, we respectfully submit that the rule of construction so often applied by this Court in the construction of public grants cited above should be applied in the construction of the ordinances in question.

PROPOSITION II: THE COUNCIL OF THE CITY OF COVINGTON HAD NO POWER TO GRANT A RIGHT, PRIVILEGE OR FRANCHISE TO USE ITS STREETS FOR STREET RAILWAY PURPOSES UNDER THE GENERAL POWER OF "EXCLUSIVE CONTROL OF THE STREETS, SIDEWALKS, LANES, ALLEYS, MARKET SPACES AND OTHER PUBLIC PLACES," CONFERRED ON IT BY THE LEGISLATURE.

The City of Covington had no power to grant a franchise to Abbott and associates. Council of the City of Covington, at the time the grants to Abbott and associates were made, had "exclusive control" over the streets, sidewalks, lanes, market spaces and other public grounds within the corporate limits of the city. The provision of the charter of the City of Covington, under which it is conceded the grant was made to Abbott and associates, and other statutes granting similar powers to municipal Councils, have been construed by the Court of last resort of the State of Kentucky adverse to the Council's power or authority to grant a franchise to use the streets for street railway purposes. Authority to grant such privileges or franchises must be derived from some source other than those conferred on Council by Act of the Legislature approved March 2, 1850. That construction given the statutes and special Acts involved in this case by the Court of Appeals of Kentucky, the court of last resort in this State, will be followed by this Court. This is the established rule and is supported by a long line of decisions of this Court.

In the case of DOUGLASS vs. COUNTY OF PIKE, 101 U. S., 677, the Court said:

> "As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly. . . . . ."

Again, in the case of BURGESS vs. SELIGMAN, 107 U. S., 20, which is, I believe, considered the leading case on this rule, the Supreme Court of United States said:

> "The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. *Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves, as authoritative declarations of what the law is.*" (Italics ours.)

In the case of BUCHER vs. CHESHIRE RAILROAD CO., 125 U. S., 555, this Court again said:

> Taking, therefore, this construction of the language of the statute, as well as prior decisions of the same purport in which we think we are bound to follow the Supreme Court of the State, we agree that the record in this case as in that does not furnish evidence which should have gone to the jury upon that branch of the subject."

The case of OLD COLONY TRUST COMPANY vs. OMAHA, 230 U. S., 100, sustains this rule. In that case, this Court said:

> ". . . . . it is of first importance to give attention to the statutes and decisions of Nebraska, because the city, being a creature of that State, derives its powers from the laws thereof, and is necessarily within the influence of the decisions of the State's court of last resort."

Under this rule, this Court will follow the construction placed upon special acts and upon the statute involved in this case by the Court of Appeals of the State of Kentucky. The Court of Appeals has consistently held that general powers conferred upon a City Council by the Legislature to control the streets of a city does not carry with it the right to grant a franchise to lay tracks upon or operate a street railway system over its streets.

In the case of LOUISVILLE CITY RAILWAY COMPANY vs. THE CITY OF LOUISVILLE, 8 BUSH, 415, the Court had under consideration the extent of the authority that the General Council of the City of Louisville had under the general

power to regulate and control the streets and highways; two special acts of the Legislature, one of which empowered the General Council to have constructed street railroad or railroads in such streets as it might designate; the other act incorporated the Louisville City Railway Company, with power to construct, maintain and operate single or double track railways along such streets or highways in the city of Louisville as its General Council might authorize.

We quote so much of the opinion as necessary to present the issue:

> "By act approved February 15, 1864, the General Assembly incorporated the Louisville City Railway Company, with authority for and during the term of thirty years to construct, maintain, and operate single or double-track railways over and along such streets or highways within the city of Louisville as its General Council might authorize, in such manner and upon such terms and conditions, and with such rights and privileges, as might be secured by contract with said General Council, 'as provided in an act for the benefit of Louisville, approved March 2, 1863.' By this act the General Council was empowered to have constructed a railroad or railroads, with single or double tracks, in such streets as might by resolution be designated, and it was provided, 'that to carry out the powers granted in section 1 of this act the General Council may, by contract, sale, or bargain, empower any corporation or corporations, parties or company to construct said street railroads, the General Council reserving all rights to regulate and control the same.'
>
> "On the 9th of August, 1864, an agreement was entered into between the appellant and the General Council of the City of Louisville by which the latter consented that the former might construct and operate a street railroad or railroads over and along certain streets, among which was Jefferson Street from Twelfth Street to its junction with the Bardstown Turnpike. The right of appellant to operate its railroads was to continue thirty years, and until the city should elect to purchase its tracks, cars, ground, etc., and pay therefor in the manner set out in the agreement.
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> . . . . . .
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> "In 1864, and during the time the greater portion of these railways were being constructed, the streets of Louisville were either bowldered or macadamized Since 1867 the city has inaugurated a system of street

improvements by which the Nicholson pavement is being gradually substituted for those in use prior to that time. Out of the reconstruction of a portion of Jefferson Street with the Nicholson pavement grows one of the matters involved in this litigation. The City gave notice to the company that it must remove its tracks upon that street for a distance of about twelve hundred and eighty yards, and put down, as the construction of the Nicholson pavement progressed, new tracks of tram rail; otherwise the City would remove such track and construct the pavement without itself providing the tram or other rail, or leaving a space in the pavement for any character of track.

. . . . . .

"The questions submitted to the chancellor for determination were:

"FIRST: Whether the City of Louisville under these circumstances can require the said railway company to take up its track of crescent rail on Jefferson Street, between First Street and Ninth Street; SECOND, if the question is determined in favor of the City, is the City bound under these circumstances to reimburse said railway company the amount it may necessarily expend in taking up its present track on said route and putting down a tram-rail; THIRD: if it be decided that the railway company is entitled to reimbursement to any extent, to what extent is it so entitled?"

The Court said:

"*Under the general legislative power of the municipal government to control and regulate the use of the streets of the city, it could not grant to any person or corporation the right to lay down a railway in a street.* Such a grant could not be regarded as a legislative act, but rather as a surrender during the term of the grant of one of the powers of the corporation. (Milhau vs. Sharp, 17 Barbour, 435.) The right of the General Council to contract with the railway company grows out of the special acts of the Legislature heretofore quoted." (Italics ours.)

If appelle Company has a franchise in perpetuity, it must turn to the Abbott grant as its source. If Council had authority to make any grant to Abbott and associates, its authority or power is conferred by Section 19, Article 2, of the Act approved March 2, 1850, quoted above. The power conferred on the Council of the City of Covington under this section has been construed by the Court of Appeals in the case of BATEMAN,

&c., vs. CITY OF COVINGTON, 90 KENTUCKY, 390. The opinion of the Court is as follows:

"The City of Covington, the appellee in this case, leased to the appellants, Bateman & Woods, for the period of five years, a part of its wharf, bordering on the Ohio River, being a small strip of land between the river and the parallel street. The appellants were invested with all the rights of the city, and were given by the terms of the lease complete control of the wharf, binding themselves to use the ground for wharf privileges only. At the time of the lease Shinkle was in possession of the wharf, using it for his own purposes, and the City failing or refusing to place the lessees in possession, they brought this action to recover damages for a violation of the contract, on the part of the City. There was a demurrer to the petition, and the demurrer sustained on the ground that the City Council had no power to make such a contract, and divest the City of the right to control its wharf for the use and benefit of the public. 'We perceive no authority in the city charter or any legislative enactment, empowering the city to make such a contract, or to deprive the public of its use. The City has the power to impose certain duties upon those availing themselves of wharf privileges, and to make such regulations as may be necessary to keep the wharf in repair for public use, but it has no power to confer such absolute control upon an individual who leases it for his own private use. The City must control the use, and for this purpose may place the ground in charge of a wharfmaster, or some agent who acts for the city, that the public may enjoy the use. A City has the exclusive control of its streets and a like control over its wharves, and in appropriating the use of either for the benefit of a private person, to the exclusion of the public, it is going beyond its power, and such a contract is void. The City is a mere trustee for the public, and all have the right to use streets and wharves, one citizen having the same right as another. (DILLON on MUNICIPAL CORPORATIONS, 659-661.)

"When a City undertakes to confer on a private individual such a right in streets or wharves, without legislative authority, as will produce a conflict between the public and the private use, the act is ultra vires; and, as said in the case of the City of Louisville vs. The Bank of United States, 3 B. M., 157, 'it would be almost as reasonable to sell and appropriate as private

property the river itself as the ground lining its margin. The object of the town or the city owning this ground is to benefit its facilities as a highway.' In this case the right to the use or control is, in effect, abandoned by the city, and the right to the possession claimed by the appellants on the one side and Shinkle on the other.

"In the case of Louisville City Railway Co. vs. City of Louisville, 8 Bush, 415, it was said that the municipal government had no power to grant the use of its streets for a railway without legislative authority. The use and control of public highways, such as streets, wharves, etc., belonging to the city, can not be surrendered by contract to a private individual to the exclusion of the public. Such highways are public property, intended for public use, and placed under the control of the city government for the benefit of the public, and any other disposition of such property, without special authority conferred by the law-making power, must be disregarded."

It was under Section 19, Article 2, of the act approved March 2, 1850, *supra*, that Council of City of Covington had "the exclusive power to establish and regulate . . . wharves," and it was this same section that conferred on Council "the exclusive control of the streets." If Council had not the right to lease the wharf for a period of five years without express legislative authority, it can not be logically said that Council without such expressed authority had the power to grant a franchise for the use of its streets in perpetuity. Council's authority in each instance is derived from the same source. No greater power was conferred in the one instance than in the other. But it may be contended that Council was parting "with all the rights of the City" to the wharf, and so it parted with "all the right and authority that the party of the first part (*i. e.*, City of Covington) has the capacity to grant," in the streets covered by the grant to Abbott and associates.

In the case of COVINGTON STREET RAILWAY COMPANY vs. CITY OF COVINGTON, 9 BUSH, 127, the Court of Appeals considered and determined the right of the Council of the City of Covington to exact and collect from said street railway company $250 per year for the privilege of using its streets for railway purposes. The Court in determining this case did not pass upon the power conferred on Council by Section 19, Article 2, of the City Charter of 1850, in respect to granting privileges to use its streets for street railway purposes, on the ground that Council had all the authority necessary to grant

the franchise under the Act of the Legislature incorporating the Street Railway Company. The Court said:

"The essential and only question presented by the record is as to the right of the City of Covington to exact as a bonus from the appellant the sum of two hundred and fifty dollars per annum for the privilege of using its streets for railway purposes. Whether or not the city charter, regardless of the act by which the Street Railway Company was organized, had the power to make this exaction is unnecessary to determine, as it may be conceded, so far as the question involved in the present controversy is concerned, that all the authority the City had in reference to this matter is derived from the Act incorporating the Street Railway Company on the 9th of February, 1864.

"This Court, in the case of Louisville Railway Company against the City of Louisville, adjudged that the City had no right to authorize the construction of street railways without some legislative enactment vesting the municipal authorities with such power. The exercise of the power to exact a bonus from the company by the City for the privilege granted is claimed to be derived from the Act incorporating the Company, by which it is permitted to construct its lines of railway over the streets, 'and to which the City Council may consent, authority for which is hereby given to said Council to make an agreement therefor.'

"This clause of the enactment has a more enlarged meaning than the counsel for appellant is disposed to give it. If the Legislature intended that the consent of the City authorities as to the running of these lines of railway on their streets was all the voice they had in the construction of the contemplated railways, then there would have been no necessity for any agreement, or for any authority in the Act itself vesting the City with the power to make an agreement with reference to the location and running of street railroads. The Company is not only required to obtain the consent of the municipal authorities, but the latter are authorized by the Act itself to make an agreement requiring a consideration for this consent. If the City is merely to consent to the action of the Railway Company in the location of its lines or in the designation of the streets, the consent could be made to appear upon the records of the proceedings of the City Council, and any agreement could not only be dispensed with, but would be wholly unnecessary. While this Railway

Company was incorporated for public use, and while this use may not be inconsistent with the purposes for which these streets were originally dedicated, still this public use is also the means of advancing individual interests, and is an appropriation of the right of way upon a public street for the benefit of the company as well as the public. The streets of a city are opened and paid for by the public for the use of the public. The citizens have the right to the free and undisturbed use of these streets for the purpose of passing over them; and when this right is restricted by reason of State or city legislation in the interest of companies, although it may be for the public good, we see no reason why the law-making power should not require some compensation for the surrender, even if it be to a limited extent, of the public use. This was doubtless the intention of the Legislature in the passage of the law, and the construction given it by the Court below is sustained by the spirit, meaning and letter of the Act itself."

This case reaffirms the Louisville case cited above, and the conclusions of the Court sustain appellant's contentions in the case at bar.

But the Court of Appeals of Kentucky in a later case did decide that the Council of the City of Covington had no power or authority under Section 19 of Article 2 of Act approved March 2, 1850, either express or implied, to grant right of way over its streets for railway purposes. The case of RUTTLE vs. CITY OF COVINGTON, 10 KY. LAW REPORTER, 766; 10 S. W. 644, the Court said:

"This action was instituted by Ruttle and others, residents and owners of real estate in the city of Covington, to enjoin the City Council thereof from passing an ordinance, or in any manner granting the right of way over, along or across any of the streets, alleys or public places of said city to the E. L. & B. S. R. R. Co., for the construction of a railroad. And the Court having dissolved the injunction granted and dismissed the action, the plaintiffs prosecute this appeal.

"If the Council possesses the power under the charter of the City of Covington, it is conferred by Section 19, which is as follows: 'They (the Council) shall have also exclusive control of the streets, sidewalks, lanes, alleys, market places and other public grounds, within the corporate limits and shall cause the same to be

kept clean and in repair.' It is clear that under the general power to control streets, sidewalks, etc., a municipal legislature can not grant the right to a corporation or individual to appropriate and use the streets of a town or city for any purpose not contemplated by the Legislature when the charter was granted, and which would tend to obstruct and hinder the free use of the streets for the purpose and in the modes they are commonly understood to be dedicated for public and private use. And as laying down railway tracks is not such an appropriation or use of streets of a town or city as they are ordinarily intended for, and as was manifestly intended by the section of the charter quoted, it seems to us no power, either express or implied, has been conferred by the city charter of Covington upon the board of councilmen to grant the right of way to the company."

Applying the rule so long recognized by this Court, to follow that construction which the highest court of a state has given a statute of the State, this and the cases above cited determine the question adversely to appellee company, so far as any right they might claim to a franchise through the grants to Abbott and associates.

This Court in the case of CITIZENS STREET RAILWAY COMPANY vs. DETROIT RAILWAY, 171 U. S. 48, sustains appellant on this proposition. In addition to respecting the decisions of the Supreme Court of Michigan in its construction of the State statutes involved in that case, the Supreme Court of the United States, enlarged upon the reasons applicable thereto. After quoting the decision of the Supreme Court of Michigan, respecting the issue involved, this Court said:-

"This decision of the Supreme Court of Michigan is persuasive if not authoritative; but, exercising an independent judgment, we think it is a correct interpretation of the constitutional provisions. The common council of Detroit, therefore, had no inherent power to confer the exclusive privilege claimed by the plaintiff in error."

The Court continuing said:-

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may

prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many which urged to this — reasons which flow from the nature of the municipal trust— even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared — insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in Minturn vs. Larue, 23 How. 435; Wright vs. Nagle, 101 U. S. 791; State vs. Cincinnati Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst vs. Salem, 32 Pac. Rep. 304; Saginaw Gas Light Co. vs. Saginaw, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this Court; Long vs. Duluth, 51 N. W. Rep. 913. See also Grand Rapids Electric Light & Power Co. vs. Grand Rapids, &c., Co 33 Fed. Rep. 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. vs. Oregonian Railway Co., 130 U. S. 1; Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24.

"The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson in Grand Rapid &c., Powers Co. vs. Grand Rapid &c., Co., supra, says: ". . . . . that municipal corporations possess and can exercise only such powers as are 'granted in *express words*, or those *necessarily* or *fairly implied, in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.*'" (The italics are his.) This would make necessarily implied' mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in Wilkinson vs. Adams, 1 Ves. & B. 422, 466, that 'a necessary implication means not

natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed." If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark: or if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any constitution not prohibiting it, and the power to prescribe the terms and regulations of the occupation derive very little if any breadth from the expression of it. But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise which stops short, or which rather does not extend to granting an exclusive privilege of occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one, contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it which is the test of the cases. The rule is one of construction. Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it. A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

"*Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them but it must be indispensable to them.*" (Italics ours.)

The case of the CITY OF OWENSBORO vs. CUMBERLAND TELEPHONE & TELEGRAPH CO., 230 U. S. 58, is one in which

this Court held the Telephone Company had a franchise in perpetuity, to occupy the alleys and streets of that city for the purpose of putting up poles and wires and conducting a telephone business. This case is not altogether similar to the instant case. First: the franchise granted in the Owensboro case was not exclusive, and second, the powers conferred on the Council of the City of Owensboro were broader than those conferred on the Council of the City of Covington. In respect to the first proposition, the court said:-

> "Nor did it undertake to grant an exclusive right. Express power to grant an exclusive street franchise has generally been held essential. Dillon, Mun. Corp., 5th ed., IP 1215, 1218, 1234. The grant in this case was not exclusive, and we are not called upon to deal with that question, since the ordinance herein involved expressly reserves the right to make similar grants."

In the instant case, if it is concluded that the franchise in question is in perpetuity, it would follow that the same terms used, to wit: "all the authority and right that the City of Covington has the capacity to, be and the same is hereby granted," is an exclusive grant, and therefore, express power to make the grant in question is essential.

The very nature of the franchise involved in the instant case precludes the possibility of making another grant for similar use of the city streets occupied by appellee company's tracks; while as a matter of common knowledge two or more telephone companies may occupy the same streets in a municipality. We therefore concede, that if the franchise in question is determined to be a perpetual one, it is also exclusive.

As to the respective powers of the Council of the City of Owensboro and the City of Covington, the power conferred on the Council of City of Covington was the "exclusive control of the streets," while the Council of Owensboro had the power "to regulate the streets, alleys and sidewalks and all improvements and repairs thereof." The Court laid particular stress upon the word "regulate." In this respect, the court said:-

> "The word "regulate" is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to use the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used.

"In CITY OF OWENSBORO vs. CUMBERLAND TELEPHONE COMPANY, 174 Fed. Rep. 739, a case involving the regulation of the rates and charges of the present appellee, the power of the City of Owensboro under its charter power to "regulate" was held by the Circuit Court of Appeals of the Sixth Circuit to amply justify the grant here involved though its duration was not involved or considered.

"That the power to "regulate" embraces power to grant to such companies the right to place and maintain their poles upon the streets has been generally held: Pikes Peak Power Co. vs. Colorado Springs, 105 Fed. Rep. 1; C. C. A. 8th Circuit; Detroit Citizens' Railway vs. Detroit, 64 Fed. Rep. 628, 636; C. C. A. 6th Circuit... In the latter case it was held that a charter power to "open, close and widen streets, and to prescribe, control and regulate the manner in which the highways, streets and avenues shall be used and enjoyed," was a power broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchise of a street railway company."

At the time the Council of the City of Covington, to wit, December 13, 1869, made the original grant to Abbott and Associates, they had not incorporated The Covington & Cincinnati Street Railway Company; therefore the power of Council to make such grant is limited to Section 19, Article 2 of the act of 1850. They continued to apply for and receive grants or modifications of former grants from the Council of the City of Covington, until January 28, 1875, when the last alleged grant was made to them. The Covington & Cincinnati Street Railway Company had been incorporated by special act of the Legislature, approved January 21, 1870. We may infer from the record that Abbott and associates had not on December 28, 1874, commenced their work of constructing their lines of street railway. This is made clear in view of the ordinance of that date granting them an extension of six months from that date to commence the construction of the proposed street railway system. Before that time, the Court of last resort of the State of Kentucky had, in the Covington Street Railway case, supra., and the Louisville City Railway Company case, supra, determined the powers of the Council in respect to granting a franchise for the use of the streets and alleys for street railway purposes. Beside, the dispute as to the duration of this franchise between the City of Covington and appellee company, is one of long standing, and dates back to the time it acquired the rights and franchises of the Covington Street Railway Company, certainly to the time it

was authorized by ordinance approved August 5, 1889, to use electric power to propel its cars.

It cannot be contended that appellee company made improvements of a permanent character at great expense, without knowing that the duration of its rights to occupy the streets of the City of Covington for street railway purposes were limited to a term of years. Therefore another reason on which this Court based its decision in the Owensboro case, is not applicable to the case at bar.

The Court in the OWENSBORO case, in this respect said:-

> "If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in People vs. O'Brien, supra, a decision accepted and approved by this court in Detroit vs. Detroit Street Railway, supra—'The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innnocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly, when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only.' Dillon on Mun. Corp., 5th ed., IP 1265."

CONCLUSION.

Now what are the rights of Appellee Company? We conceive that it bases its right to a franchise in perpetuity, as

was decided by the District Court solely on the grant made by the ordinance December 13, 1869, to Abbott and Associates. This and the grants subsequently made to them December 28, 1874, and January 28, 1875, were made as before stated, under Section 19, Article 2 of Act approved March 2, 1850, giving Council "exclusive control of the streets." Applying here the constructions of the Court of Appeals of Kentucky to the powers which this section conferred on Council in the BATEMAN case, supra., the COVINGTON STREET RAILWAY COMPANY case, supra., the RUTTLE case supra, and the case of THE LOUISVILLE CITY RAILWAY COMPANY, involving the construction of similar statutes, Abbott and associates received no valid right to use the streets of the City of Covington for street railway purposes. Appellee's franchise to use the streets for such purposes, was acquired by purchase from The Covington Street Railway Company. In making the grant to The Covington Street Railway Company, Council of the City of Covington was invested with the power and authority to grant it a franchise under and by virtue of the provisions of its charter which provided:-

> "The business of this corporation shall be to construct and use railway along the streets of Covington, and in the suburbs of said city. It may construct the lines along such streets, either with single or double track, as they may consider beneficial to the interest of the Company, and to which the city Council of said City may consent, authority for which is hereby given to said council to make an agreement therefore....."

This grant is expressly limited to a period of twenty-five years from the 15th day of August 1865. The right to operate under this grant therefore, expired August 15, 1890. But the duration of the franchise claimed by appellee being a matter of disagreement between the city and the appellee company, which terminated then in litigation, an agreement was entered into between appellant and appellee, whereby appellee's rights to use and occupy the streets for street railway purposes were agreed upon, which is fully set forth in the ordinance passed and approved October 7, 1892.

By this agreement, the City of Covington was to

> ".... postpone the enforcement of any of its claimed rights to sell any of the franchises of said company for a period of twenty years from and after the acceptance of this ordinance, and during said period of twenty years, it will not attempt to sell or offer for sale any of said franchises...."

The appellee company was to make certain improvements, in the ordinance specified among which was the following:-

> ".....that said street railway company shall operate all of its lines by electricity as a motive power, using no horses or mules, and all poles to be hereafter erected by said company shall be of iron or steel, both along the new routes and also along the old, when new poles are needed..."

Appellee company accepted the terms of this ordinance in writing October 18, 1892, and executed bond for the faithful performance of the conditions and provisions thereof. This agreement terminated October 18, 1912, since which time the Appellee company has operated and it is now operating its lines of street railway upon and over the streets of the City of Covington without right or authority.

We have endeavored to present to the Court fairly the issues involved in this appeal, believing that the District Court erred in granting the injunction prayed for in appellee's bill, and earnestly ask that the Judgment of the District Court of Eastern District of Kentucky be REVERSED. All of which is

Respectfully submitted,

A. E. STRICKLETT,

Solicitor of City of Covington.

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No. 225.

Supreme Court of the United States.

October Term, 1917.

CITY OF COVINGTON,
Appellant,

versus

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellee.

Brief for Appellee.

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Supreme Court of the United States.

October Term, 1917.

CITY OF COVINGTON,

Appellant,

No. 225. *vs.*

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,

Appellee.

Brief for Appellee.

This is an appeal from a decree (R., 176) of the United States District Court for the Eastern District of Kentucky, in an action by the Railway Company against the City, finding that an ordinance of the City of Covington (R., 109) providing for the offering at public bidding of a franchise to operate a street railway on its streets, was an impairment of the franchises of appellee upon the same streets, and a cloud upon its title and enjoining the granting of a franchise under such ordinance.

Appellee was, and had been for many years, engaged in the operation of a street railway system in Covington. The City, claiming that its rights had expired, undertook by the ordinance complained of, to terminate its operation thereunder. The company, claiming that its rights

are still in full force and effect, and that the ordinance necessarily impaired them, and cast a cloud upon its title, brought suit in the District Court praying an injunction against granting any franchise thereunder.

The opinion of Judge Cochran, the District Judge, on plaintiff's motion for preliminary injunction and defendant's motion to dismiss the bill, is on page 164 of the record.

On the motion for preliminary injunction, the facts, including copies of the relevant acts, ordinances, contracts, etc., were before the court by affidavit.

After the preliminary injunction was allowed, the case was submitted for final decree upon the same evidence that was before the court on motion for preliminary injunction, with the addition of the deposition of W. H. Harton. See stipulation as to proof (R., 32).

The court did not give any further opinion but entered a decree (R., 176) in accordance with his opinion on the motion.

THE COMPANY'S GRANTS.

The principal charters, proceedings and grants under which the company claims, are set forth in their order for the convenience of the court in Appendix I to this brief, and may be considered under the following heads:

I. The Abbott Grant of December 23, 1869, and supplements, including the legislative grant of March 13, 1878.

II. The grant of June 8, 1882.

III. Subsequent ordinances extending or modifying the routes.

I. THE ABBOTT GRANT AND SUPPLEMENTS.

The company's rights date from and are largely based upon what is known as the Abbott grant, which is a contract with the City of Covington dated December 23, 1869 (App. 3; R., 64), and made under the authority of an ordinance of the City of Covington dated December 13, 1869 (App. 1-2; R., 60).

The ordinance grants to E. F. Abbott and associates "all the authority and right that the City of Covington has the capacity to grant" to construct, hold and operate a street railroad upon certain streets therein named. The ordinance proceeds:

> "Said grant is upon condition and in consideration of the strict and faithful performance by said grantees of all the terms, stipulations and covenants contained in a certain written agreement made by and between said city and grantees of even date herewith, and of record on the minutes of said council, and said grant shall determine upon failure of such performance." (App. 2; R., 60, 61.)

The agreement reads:

> "That in consideration of the terms, stipulations and covenants hereinafter made by the said party of the second part (Abbott) the said party of the first part (Covington) hereby agrees to grant unto the said party of the second part, all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad upon and along Scott street from Fourth to Sixteenth," etc. (App. 3; R., 64.)

Less than a month later, on *January 21, 1870,* Abbott and associates became incorporated by special act of the General Assembly of Kentucky as The Covington & Cincinnati Street Railway Co., a corporation with *perpetual* succession, with power to construct, and manage railways in the City of Covington and vicinity (App. 11; R., 68). By the provisions of Section 5 of that act

> "The business of said corporation shall be the construction and operation of street railways in said city and vicinity along such streets and public highways of the city as the Council may grant the right of way to * * * and said city * * * hereby authorized to grant the right of way," etc.

By Sec. 5, it was given power to condemn a right of way, if unable to obtain it by agreement. By Section 6, the company was authorized to acquire such real and personal property, routes and railway tracks as might be deemed requisite for its use.

By ordinance of *December 28, 1874* (App. 13; R., 70), the time for the commencement of the work of constructing the street railway lines set forth in the contract of December 23, 1869, was extended six months from December 28, 1874,

> "upon the terms, conditions and stipulations contained in said contract as if the same were herein repeated. The said Abbott and his associates incurring all the liabilities and responsibilities therein provided and to enjoy all the rights and privileges therein granted."

One of the routes described in the original contract was modified by this ordinance.

By ordinance of *January 28, 1875* (App. 13; R., 76), Abbott and his associates were authorized, on the completion of the street railway on the Fourth and Main street route, to construct a line of street railway from Fourth street north through Market street and the alley immediately north thereof to the Suspension Bridge.

On *May 1, 1875,* Abbott and his associates made a formal deed to The Covington & Cincinnati Street Railway Co., of all their rights as aforesaid. (App. 14; R., 71.)

It appears from the affidavit of Mr. George M. Abbott (R., 30), who had personal knowledge and was personally concerned therein, that The Covington & Cincinnati Street Railway Co. built and commenced the operation of a street railway line over the streets mentioned in said ordinances, in the year 1875, at an expense of more than $48,000.

On June 24, 1875, while the road was in process of construction, the City recognized the company's ownership of the Abbott grant by a grant to it of a temporary connection track, the ordinance beginning:

> "That the Covington & Cincinnati Street Railway Company be and are hereby authorized to connect *their* track on Market street with *that on Fourth street,* by running west on the north side of Market Space to Scott street," etc. (App. 16; R., 75.)

On *January 25, 1876,* by special act of the General Assembly of Kentucky (App. 17; R., 72), E. F. Abbott and his associates, were incorporated under the name of The *South* Covington & Cincinnati Street Railway Co. (appellee) with "perpetual succession" and with "full power to * * * construct, operate and manage street railways in the City of Covington and vicinity."

Section 3 of said act is as follows:

> "The business of said corporation shall be the construction, operation and management of street railways in the City of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel and plank roads; and it may at any time, by agreement, purchase, lease, consolidate with, acquire hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport, or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof."

On *December 20, 1876,* The Covington & Cincinnati Street Railway Co. deeded all its property and franchises to The *South* Covington & Cincinnati Street Railway Co. (App. 23; R., 76.)

April 5, 1878, the charter of The South Covington & Cincinnati Street Railway Co. was amended, directly authorizing and empowering the company

> "To construct, extend and operate its line of railway along Fourth street from Scott street to the Newport and Covington Bridge over the Licking River and to cross the same on such terms as may be agreed upon by and between

said bridge company and this street railway company." (App. 21; R., 74.)

This was a direct legislative grant of a right of way on Fourth street.

On *October 13, 1881* (App. 25; R., 79), the City Council passed an ordinance which is as follows:

"WHEREAS, The South Covington & Cincinnati Street Railway Company has laid and is now using a single track railway in the alley running from Third street, north to the Covington & Cincinnati Bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track, which it is believed will promote the convenience of the general public; therefore,

"BE IT ORDAINED BY THE CITY COUNCIL OF COVINGTON, That The South Covington & Cincinnati Street Railway Company, be, and the same is hereby, authorized to lay a double track on said proposed avenue, from Second street to Market space, so as to make connection with its tracks as now laid on Market space and Market street and to use and to enjoy the same, as well as its track on Fourth and Scott streets, *upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track, by the provisions of a certain agreement entered into by E. F. Abbott and the City of Covington, on the 23d day of December, 1869.*

"PROVIDED HOWEVER, That the said South Covington & Cincinnati Street Railway Company shall file with the city clerk its written acceptance of this ordinance within ten days after its passage."

This ordinance was duly accepted in writing (see Abbott affidavit (R., 30.)

In the year 1881, therefore, The South Covington & Cincinnati Street Railway Co. was the owner of the franchise on the streets of the City of Covington, embodied in the foregoing charters, ordinances and grants, and was engaged in the operation of a line of street railways on the streets therein named, and indicated in green on the plat filed with the affidavit of George M. Abbott (R., 32), and over the Suspension Bridge to and through the City of Cincinnati and return.

We claim, and the court below held, that the company's franchise as above set forth, was perpetual and within the power of the city to grant.

THE CITY HAD POWER TO MAKE A PERPETUAL GRANT.

Not only was the city authorized under the general statutes to make such a grant, but under the special charters referred to it was authorized to grant the right of way which, with the legislative authority given by the charters themselves, vested a perpetual franchise in the companies respectively.

ITS AUTHORITY UNDER THE GENERAL STATUTES.

By the *Consolidation Act of March 2, 1850* (Kentucky Acts 1849-1850, page 239, Wells Revision, page 104), the following powers were given to the City:

> "Sec. 2. * * * that all the streets, roads, lanes, alleys, commons, market spaces, public squares and grounds, and public landings, in said city, be and at the same time *are hereby vested in the city;* and where the owner of any land, within said corporation, shall lay out any

street, lane, alley, or any ground for public use, and so dedicate the same, it shall immediately vest in the city, and the authorities thereof shall have exclusive control over the same for the public use and good."

Section 19 is as follows:

"The council shall have the exclusive power to establish and *regulate* market spaces, wharves, docks, and to fix the rates of wharfage and other fees for the use thereof; and they shall also have exclusive power to establish and *regulate* the grades of all wharves and landings: all banks of the rivers Ohio and Licking, within the corporation limits, and all sidewalks, *streets, alleys,* lanes, spaces and commons of the city. They shall also have the *exclusive control of the streets,* sidewalks, lanes, alleys, market spaces and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair."

By the legislation above quoted the City of Covington held the *title* to its streets and public places and council had full power of *control* and *regulation* over them.

Under the express powers thus given to the City it had the power to grant a perpetual franchise.

On this subject Judge Cochran said (R., 166):

"By virtue of these provisions the defendant, at the time of the grant to Abbott and associates, was vested with an absolute title in its streets, was empowered to regulate them and had the exclusive control thereof. This title and right to regulate and control was sufficient in itself to empower defendant to grant to Abbott and associates a perpetual right to construct, operate, and maintain a street railway on its streets."

In *Owensboro* v. *The Cumberland Telephone & Telegraph Co.*, 230 U. S., 58, page 67 *et seq.*, the court held that the City of Owensboro had power to grant a perpetual franchise under the 27th section of its charter giving to council the power to

> "regulate the streets, alleys and sidewalks and all improvements and repairs thereof."

The court reached this conclusion after a review of the Kentucky authorities.

This seems to us to foreclose the question of the power of the City of Covington to make the perpetual grant to Abbott.

Appellant's Authorities.

The earlier case, *Detroit Citizens Street Railway Co.* v. *Detroit Railways*, 171 U. S., 48, where it was said that franchises "given in perpetuity and in monopoly by a municipality must have for their authority explicit permission," etc., was a case which did not involve a perpetual franchise but an exclusive franchise, limited to 30 years from the date of its passage. The only question before the court, and therefore the only question which the court intended to decide, was whether the City of Detroit had the power to grant an exclusive franchise, and it was held that it had not.

In the Owensboro case this court held that while express power to grant an exclusive street franchise has generally been held essential, it was not essential to the granting of a perpetual franchise.

In fact we do not find a single case among those in which perpetual franchises were upheld, where a munic-

ipal corporation had express power given to it in so many words to make such a grant. The power was generally based on the municipal control of the streets.

Counsel for the City of Covington contends that this case should be distinguished from the Owensboro case, because here the only power is the "control" of the streets, whereas in the Owensboro case the city had the power to "regulate." Counsel is in error in point of fact, even if there were a distinction in law. The City of Covington had title to the streets and Council was given both power of control and regulation. (See Sections 2, 19, Consolidation Act March 2, 1850, *supra.*)

Counsel seeks also to draw some distinction between a telephone franchise, such as that involved in the Owensboro case, and a street railway franchise.

But the doctrine of the Owensboro case, that the power to "regulate" embraced the power to grant the perpetual franchise therein upheld, was not based on the peculiar character of a telephone franchise. The principal cases cited by the court in support of its holding are street railway and railway cases.

Detroit Citizens R. R. v. *Detroit*, 64 F., 628.
Atchison Street Railway v. *Mo., etc., Ry.*, 31 Kan., 661.
Brown v. *Duplessis*, 14 La. Ann., 842.
C. B. & Q. R. R. v. *Quincy*, 136 Ill., 489.
New Castle v. *Lake Erie, etc., R. R.*, 155 Ind., 18.

The leading cases cited by the court on the permanent character of the Owensboro franchise (230 U. S., on page 65) are *People* v. *O'Brien*, 111 N. Y., 1, and *Detroit* v. *Detroit Citizens Street Railway Co.*, 184 U. S., 368, which are street railway cases.

In fact an examination of the authorities will show that the principles laid down in the Owensboro case had their origin in railroad and street railroad cases and that telephone companies and other public utilities were later held to come under the same rulings.

Counsel also says, "the very nature of the franchise involved in the instant case precludes the possibility of making another grant for similar use of the city streets occupied by appellee company's tracks." From this he argues that the franchise is, in effect, exclusive and therefore not within the power of the city.

While appellee is entitled to freedom from interference by other street railway lines on the particular portions of the streets where its tracks are laid, this is true of all street railway franchises and does not make them what are known in law as "exclusive" franchises. That expression means a franchise which is exclusive by its terms, irrespective of the physical situation.

An attempt was made by the appellee in the case of *Northern Ohio Traction Co.* v. *State, ex rel Pontius, infra,* to convert the franchise there involved, by the same process of reasoning, into an exclusive franchise for the purpose of making it invalid, but the court did not take that view. A street may be wide enough, or may be widened, so as to permit additional tracks, in which case they may be authorized without violating the rights of the first grantee.

Counsel for the City claims that it had no power, under the statutes above referred to, to grant any street railway franchise, perpetual or otherwise. This claim is based on certain language used by the Court of Appeals in *Louisville Railway* v. *City of Louisville,* 8 Bush, 415 (1871), and referred to in one or two subsequent decisions of the court. The court said (page 420):

> "Under the general legislative power of the municipal government to control and regulate the use of the streets of the city it could not grant to any person or corporation the right to lay down a railway in a street."

In that case the City Railway was in the streets under an ordinance authorized by special acts of the Legislature. Its franchise was not questioned. The only question in the case was whether the city might require it to remove its rails and substitute better rails in connection with the repaving of the street. The court found that the city might make such requirement by virtue of provisions in the special legislation authorizing the franchise, and, apparently for the purpose of confining the controversy solely to that special legislation, used the language above quoted, as to the general powers of the city.

The case can not be treated therefore as having the effect which counsel claims for it. It was cited on the same point by counsel in *Owensboro* v. *Cumberland Telegraph & Telephone Co.*, 174 F., 739, where the Circuit Court of Appeals, by Judge Lurton, said (page 751):

> "The case of *Louisville Railway* v. *City of Louisville*, 8 Bush. (Ky.), 415, is not in point. The only question in the case was whether the city might require a street railway company to remove its rails in order to allow the city to repave the street. The city railway was in the streets under an ordinance authorized by express legislative power. All that was said in reference to the insufficiency of a power to control and regulate, to support consent to occupation of streets by a street railway, was foreign to the case and not authoritative."

In *Covington Street Railway Co.* v. *City of Covington*, 9 Bush, 127 (1872), the court had under consideration the power of the City of Covington to exact a bonus from the Covington Street Railway Co. (not appellee or its predecessor). It did *not* hold that the City of Covington had no power to grant a street railway franchise except such power as it derived from the act of incorporation of the Covington Street Railway Co. It declined to pass upon that question and merely conceded (to the losing party) for purposes of argument that so far as the right to exact a bonus was concerned the City had no power except that contained in said act of incorporation, and then held that under said act of incorporation the City had such right.

Ruttle v. *Covington*, 10 Ky. Law Rep., 766 (1889), was a suit to enjoin the City of Covington from granting a right to construct steam railway tracks upon the streets.

The court held that under the general control which the city had over its streets, it could not grant the right to use the streets for a purpose

> "which would tend to obstruct and hinder the free use of the streets for the purposes and in the modes they are commonly understood to be dedicated for public and private use."

Obviously this principle would not apply to street railway tracks, for such use is a proper and well understood street use.

Even if this case involved the question raised by the City Solicitor, the decision was long after appellee's rights had vested. The Court of Appeals had held in *Wolfe* v. *Covington & Lexington Railroad*, 15 Ben Monroe, 404 (1854), before appellee's grant and after the Act of March 2, 1850, giving Covington ownership and

control of its streets, that the City of Covington had the power to grant a steam railroad the right to lay its tracks and operate its railroad along Washington street in the City of Covington. The details of the grant do not appear but it was presumably a permanent grant and so far as we can ascertain the City Council had no express authority other than the ownership and control of its streets above referred to. The court held that such a grant was for a proper street use.

Bateman v. *City of Covington,* 90 Ky., 390 (1890), held that the city, by virtue of its control of the wharf, had no power to lease a portion of it to a private individual to the exclusion of the public and for solely private use.

In none of these cases, therefore, was the question presented whether the city, by virtue of its ownership, control and power of regulation of its streets, had the right to grant a street railway franchise, and none of these cases can be properly said to have decided the question.

In *American Car & Foundry Co.* v. *Johnson County,* 147 Ky., 69, the Court of Appeals of Kentucky said (page 71):

> "The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so, municipal corporations may grant franchises to use the streets and public ways of a city, as the municipality has control of the streets and public ways."

The general rule on the subject is stated in *Dillon on Municipal Corporations,* Section 575, where the author,

after stating that the usual powers of a general nature delegated to municipal corporations are not ordinarily sufficient to confer upon them the right to authorize the presence of steam railways upon the streets, says:

> "but it is otherwise as respects street railways; and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit, or to refuse to permit the use of streets within their limits for such purposes."

This section of Dillon was cited with approval by the court in *Owensboro* v. *Cumberland Telegraph & Telephone Co.*, 130 U. S., on page 70.

Its Power Under the Legislative Charters of the Companies.

Even if there were ground for questioning the City's general power, it would be unimportant in view of the power expressly given by the special acts of the Legislature of Kentucky incorporating the Covington and Cincinnati Street Railway and its successor, The South Covington and Cincinnati Street Railway Company, the appellee.

The original grant to Abbott, Redgate and Blick, their associates, successors and assigns, was by contract dated December 23, 1869. Less than a month after this grant, January 21, 1870, Abbott, Redgate, Reid and Morton "and their associates" were incorporated under the special act above referred to (App. 10; R., 68) as the Covington and Cincinnati Street Railway Company, with *perpetual succession*, and with power to construct and operate street

railways in Covington along such streets as Council might grant the right of way to, and the City was authorized to grant the right of way. (Rec., 5.)

Subsequently, on December 28, 1874 (App. 13; R., 70), the time for the completion of the road was extended for a period of six months, and the route was modified.

As Abbott and his associates had been incorporated by special act of the Legislature for the purpose of building and operating a street railway in Covington, and as the special act empowered Covington to grant such corporation a right of way, the right of way theretofore given to them, and thereafter confirmed in them by the City in the extension ordinance of Dec. 28, 1874, is legally referable to the power given to the City by such special act.

Furthermore, on May 1, 1875, Abbott and his associates made a formal deed to the corporation, of all their rights as aforesaid (App. 14; R., 71), and in that year the corporation built and commenced the operation of the road. (R., 30.) While it was in process of construction, on June 24, 1875, the City recognized the corporation's ownership of the Abbott grant, by an ordinance permitting it to lay a temporary connection track, the ordinance beginning

> "That the Covington and Cincinnati Street Railway Company be and are hereby authorized to connect *their* track on Market Street, with *that on Fourth Street*, by running west on the north side of Market space to Scott Street," etc. (App. 16; R., 75.)

Thereafter on January 25, 1876, by special act of the Legislature of Kentucky, Abbott and associates were incorporated as the South Covington and Cincinnati Street

Railway, with "perpetual succession" and with "full power" to construct and operate street railways on such streets in said city as Council should grant the right of way to, and Council was authorized to grant the right of way. It was also authorized to acquire any other street railway in Covington. (App. 17; R., 72.)

On December 20, 1876, the Covington and Cincinnati Street Railway Co. deeded its road and property to the South Covington and Cincinnati Street Railway Co.

On April 5, 1878, the Legislature of Kentucky recognized the South Covington and Cincinnati Street Railway Company's ownership of the road by amendment to its charter, giving it a legislative grant to *extend* its line of railway along Fourth Street from Scott Street to the bridge over the Licking River (App. 21; R., 74), and on October 13, 1881, the City Council of Covington passed an ordinance (App. 25; R., 79) authorizing the company to double track the proposed Court Avenue and connect said tracks with its other tracks, and to use and enjoy the same "upon the same terms and conditions, as it is authorized to use and enjoy the remainder of its track, by the provisions of a certain agreement entered into by E. F. Abbott and the City of Covington on the 23d day of December, 1869."

The City's recognition of the ownership by the two companies successively, of the Abbott grant, amounted to an express confirmation thereof in those companies and was backed by all the power which the City had, under the special acts of incorporation, to make original grants to those companies, which power, as we have seen, was complete and comprehensive.

The companies were given perpetual succession. The City's power, under the acts of incorporation, to grant

them rights of way was unlimited as to time and was as broad as the corporate purpose. (*Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 664.)

The power of condemnation, which in each charter was given to the corporation, on failure to obtain a right of way by agreement is further evidence of the perpetuity contemplated, because a right of way obtained by condemnation would of course be perpetual.

THE ABBOTT GRANT WAS AN EXPRESS GRANT OF A PERPETUAL FRANCHISE OR EASEMENT.

Where a municipal corporation owning and having the power to control and regulate its streets, grants a right-of-way thereon to a public utility without limiting its duration, such grant is a permanent grant, not by implication, but because that is a recognized method of giving a permanent grant.

In the case of *Owensboro* v. *Cumberland Telegraph & Telephone Co., supra,* the court said on pages 990-991:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant. *Detroit* v. *Detroit Citizens' Street R. Co.*, 184 U. S., 368, 395; 46 L. Ed., 592, 610; 22 Sup. Ct. Rep., 410; *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 661; 56 L. Ed., 934, 939; 32 Sup. Ct. Rep., 572; *People* v. *O'Brien*, 111 N. Y., 1,

42; 2 L. R. A., 255; 7 Am. St. Rep., 684; 18 N. E., 692; *People, ex rel Woodhaven Gaslight Co.,* v. *Deehan,* 153 N. Y., 528; 47 N. E., 787; *Mobile* v. *Louisville & N. R. Co.,* 84 Ala., 115; 5 Am. St. Rep., 342; 4 So., 106; *Arcata* v. *Arcata & M. River R. Co.,* 92 Cal., 639; 28 Pac., 676; *State, Hudson Telegraph Co., Prosecutor,* v. *Jersey City,* 49 N. J. L., 303; 60 Am. Rep., 619; 8 Atl., 123; *Dill. Mun. Corp.,* 5th Ed., Section 1265; *Nebraska Telegph. Co.* v. *Fremont,* 72 Neb., 25, 29; 99 N. W., 811; *Plattsmouth* v. *Nebraska Telegraph Co.,* 80 Neb., 460, 466; 14 L. R. A. (N.S.), 654; 127 Am. St. Rep., 779; 114 N. W., 588. If there be authority to make the grant, and it contains no limitation or qualification as to duration the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right can not be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People* v. *O'Brien,* 111 N. Y., 1, 42; 2 L. R. A., 255; 7 Am. St. Rep., 684; 18 N. E., 692; a decision accepted and approved by this court in *Detroit* v. *Detroit Citizens' St. Ry. Co.,* 184 U. S., 368, 395; 46 L. Ed., 592, 610; 22 Sup. Ct. Rep., 410, 'The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made, and the rights of innocent investors and of third parties

as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.' *Dill Mun. Corp.*, 5th Ed., Section 1265."

See also to the same effect:

Louisville v. *Cumberland Telephone Co.*, 224 U. S., 649.
Grand Trunk Western Ry. v. *South Bend*, 227 U. S., 544.
Old Colony Trust Co. v. *Omaha*, 230 U. S., 100.
Northern Ohio Light & Traction Co. v. *State of Ohio, ex rel Pontius*, — U. S., —, decided Jan. 28, 1918.

Our contention is supported by a recent decision of the Court of Appeals of Kentucky in the case of *City of Dayton et al* v. *South Covington & Cincinnati Street Railway Co.* (October, 1917), 177 Ky., 202.

The City of Dayton ordered the removal of certain tracks which had been laid in 1897 under a franchise originally granted by legislative charter and municipal consent in 1868, supplemented by municipal permission in 1897 for one of the two tracks. All of the grants were silent as to time. The court held they were not mere licenses, but property rights and were still in full force and effect, and enjoined the removal of the tracks. The court said:

"In this case the right to construct such turnouts as might be necessary for the operation of the street railway was conferred upon the original corporation, Newport & Dayton Street Railway Company, by its charter enacted in 1868. Under it the city of Dayton in the same year consented for a street railway company to be constructed upon its streets and it suffered and permitted it to be so constructed with the turnout heretofore mentioned. The increased traffic over the line necessitated the doubling of the track, which was done by the city's permission. All this occurred before the adoption of the present constitution requiring franchises upon public streets to be sold at public sale to the highest bidder. The right to the franchise then was acquired as soon as the street railway was constructed with the permission of the city. This right carried with it the privilege of constructing the turnout as well as acquiring and using the lot in question. After the doubling of the track the advancement of science necessitated the substitution of electric power for animal power, thus requiring the turnout originally consisting of a single track to be converted into a loop by the addition of another track to the turnout, and this second track was not the construction of a new turnout, but conforming the old one to modern conditions so as to meet the requirements and necessities of increased traffic and the substitution of electric for animal power. It was not therefore the granting of an additional franchise so as to convert the city's consent given in 1897 into a mere license, which it may revoke at pleasure. In short, we hold that under the facts disclosed by this record the plaintiff possesses a property right in and to the tracks constituting the loop in question and to the use of its lot in connection with the opera-

> tion of its railway, of which the city may not deprive it in the manner attempted."

The court in reaching its conclusion cited the following decisions of this court:

> *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S., 649.
> *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S., 59.
> *Grand Trunk & Western Railroad Co.* v. *South Bend*, 227 U. S., 558.

Our present contention, therefore, is supported not only by the decisions of this court but by the decision of the Court of Appeals of Kentucky.

While it is sufficient that the ordinance grants a right without limitation as to time, there are other evidences in the ordinance and agreement showing affirmatively that it was the meaning and intent that the grant should be perpetual.

(*a*) Both the contract and the ordinance recite that the City grants to the company

> "all the right and authority that the said party of the first part has the capacity to grant."

Obviously this indicates the purpose of the City to make as complete a grant as it was capable of making, and, as we have seen, this is a perpetual grant.

Counsel for the City contends that this language was inserted to avoid conflict with a claim made by the *Covington* Street Railway Company (then operating a street railway on other streets in Covington) in its protest of May 13, 1869 (R., 56) that the City had no moral or legal right to make a grant to anyone other than itself on any streets.

This, we submit, is all surmise.

The claim in the protest of a wholesale legal monopoly was without foundation or merit (see charter, ordinance and contract App. 54, *et seq.*; R., 37, *et seq.*) and very slight emphasis was placed upon it in the protest. There is neither evidence nor reasonable ground to believe, that the City Council took it seriously or felt it necessary to avoid conflict with it by the use of any language for that purpose in the Abbott grant made more than seven months later. The protest appears in the record unexplained and unaccompanied by any evidence showing what action, if any, the City Council took with reference to it. For aught that appears in the record it may have been promptly overruled or withdrawn.

Furthermore we can not assume that the language in question was used for the suggested purpose, because it would not have been appropriate or effective to that end, if indeed any qualifying language in the grant would have avoided conflict with a claim that the City had no right to make any grant.

But whatever may have been the thought or circumstance which led the City Council to describe the grant as "all the right and authority that the party of the first part has the capacity to grant,"—whether or not it was inspired by some doubt as to the City's power—the language used is clear, it gives all that the City has the power to give, and leaves nothing for construction except the capacity or power of the City. When the extent of that power is ascertained the extent of the grant is determined. As we have seen, it was within the power of the City to make a perpetual grant.

(*b*) The ordinance recites that the grant is in consideration of the faithful performance of the conditions of the contract

"and said grant shall determine upon failure of such performance."

This indicates clearly the intention of the City that the company should hold its grant as long as it complied with its terms.

On this subject Judge Cochran said (R., 167):

"This brings us to the question whether it did in fact grant such a (perpetual) franchise to them. And as to this also there would seem to be no possible room for doubt. Both in the ordinance of December 13, 1869, and the contract of December 23, 1869, made pursuant thereto, it was provided that defendant granted to Abbott and associates 'all the authority and right' that it had 'the capacity to grant.' We have just seen that it had the capacity to grant to them a perpetual franchise. The provision then that there was granted all the authority and right that the city had the capacity to grant was the same as if it had said in so many words that it granted a perpetual franchise. The English language is not so poor that the same idea can not be expressed in different ways. Here, instead of saying that a perpetual franchise was granted it was said that all the authority and right which the city had the capacity to grant was granted, which meant exactly the same thing.

"Possibly the phraseology used indicates that defendant was not sure of the extent of its power and that the effect of the grant would be to pass a perpetual franchise. But it is clear that it intended that Abbott and associates should thereby acquire as enduring a franchise as it had the power to grant, and as it had power to grant a perpetual franchise it was within its intent that such a franchise should pass by the

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grant which it made. That the intent was to grant a perpetual franchise is enforced by another consideration. In the ordinance it was provided that the grant was made upon condition and in consideration of the strict and faithful performance by the grantees of all the terms, stipulations and covenants set forth in the contract, which it recited was of even date therewith and of record in the minutes of the council and that the grant should 'determine upon failure of such performance.' It appears from this provision that the only termination of the right granted, contemplated by the parties, was upon the happening of this condition subsequent."

THE RULE OF CONSTRUCTION.

Counsel for the City has cited the rule of construction that public grants in case of ambiguity are to be construed against rather than in favor of the grantee. But he does not point out any ambiguity in this case to call for the application of the rule.

He cites *Blair* v. *Chicago*, 201 U. S., 400. On page 472 the court says that the rule

> "requires such grants to be made in plain terms in order to convey private rights in respect of public property."

The court quoted with approval the decision in *Perine* v. *Chesapeake & Delaware Canal Co.*, 9 Howard, 172, 192, where the court said:

> "The rule of construction in cases of this description * * * is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public and the corporation can claim nothing that is not clearly

given by the law. We do not mean to say that the charter is to receive a strained or unusual construction contrary to the obvious intention of the grant. It must be fairly examined and considered and reasonably and justly expounded."

The court said on page 473:

"Grants of this character are not to be destroyed by an unreasonable or narrow interpretation."

In *Citizens Bank* v. *Parker,* 192 U. S., 73, the court states the limits of this rule in the following language on pages 85 and 86:

"The exemption of the charter includes a license tax. This, for the reason stated, must be regarded as part of the contract between the State and the bank. And in reaching that conclusion the rule requiring a strict construction of statutes exempting property from taxation has not been infringed. We recognize the force and salutary character of the rule, but it must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. The decisive simplicity of such effect is very striking. It conveniently removes all difficulties from judgment in many cases of controverted construction of laws. But we can not concede such effect to the rule, nor is such effect necessary in order to make the rule useful and, at times, decisive. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when

> all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute."

A franchise silent as to time is not ambiguous.

An examination of the cases in which perpetual franchises have been upheld by the courts will show that in all of them the franchises were silent as to time and that this absence of limitation has been held to indicate a permanent or perpetual grant. When we add the other considerations in this case, namely, the particular language of the Abbott grant, the perpetual rights given by the charters of the companies, and the power of condemnation, under which they could have obtained perpetual rights on failure to obtain them by agreement, there is no room left for the application of the rule of strict construction.

The Abbott Grant Was Not Limited by the Ordinance of 1864.

It is claimed by the City that the term of the Abbott grant (made in 1869) is limited to twenty-five years by the following provision of an ordinance of the City of Covington of December 15, 1864 (App. 64; R., 43), which is as follows:

> "All contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years."

That ordinance and the proceedings thereunder are set forth in their order in Appendix II of this brief.

The Abbott grant or contract of December 23, 1869,

was not made "under the provisions" of the ordinance of 1864. The Abbott grant contains no references whatever to that ordinance. That ordinance contains no reference to the Abbott grant. There is nothing in either document to indicate any connection with the other.

The Abbott grant was made "under the provisions" of the ordinance of *December 13, 1869* (App. 1; R., 60) which set forth in full the contract to be made thereunder, containing no such limitation.

It is claimed that the language above quoted from Section 13 became a term of all subsequent contracts because the ordinance of 1864 commenced as an ordinance general in form, although adopted for the purpose of letting a particular franchise.

We shall show later that this ordinance can not be treated as a general ordinance, but let us assume for a moment that it can be so treated.

Section 13 of the ordinance does not undertake to limit all subsequent contracts to twenty-five years, it simply says that

> "All contracts *made under the provisions of this ordinance* shall be for the term and period of twenty-five years."

What is meant by "all contracts made under the provisions of this ordinance?" This is answered by Section 8 of the ordinance which provides that any company or individual to whom the privilege should be granted should

> "within fifteen days after the award granting such privilege come forward and sign the proper contract, agreeing to abide by these stipulations," etc.

Section 13 of the ordinance therefore meant that any such contract as that provided by Section 8 should contain the limitation to a period of twenty-five years.

It can not be claimed that all contracts which the City of Covington made thereafter, were made under the terms of this ordinance. No contract could be construed as being made under the terms of that ordinance unless, in accordance with Section 8, it contained an agreement to abide by the stipulations of said ordinance, or incorporated such ordinance by reference.

This construction is illustrated by the first and only contract that was made under that ordinance, namely, the agreement of August 15, 1865, with The *Covington* Street Railway Co. (not appellee or its predecessor) (App. 68; R., 51). That agreement stated that the grant was made to the *Covington Street Ry. Co.*, "upon the terms and conditions contained in an ordinance of said City Council passed on the 15th day of December, 1864."

It also contained the following language, "This contract shall continue in force for a period of twenty-five years from its date." The City very clearly exhibited what it understood by "a contract made under the terms of the ordinance."

The general scheme in the passage of that ordinance is clear and simple; it set forth the terms upon which the City of Covington was then willing to grant a street railway franchise and provided in Section 8 the character of contract which the grantee was to execute, namely, a contract to be governed by the terms of that ordinance. All it contemplated was a contract designating the streets and referring expressly to the ordinance for the terms upon which those streets could be used. Only a contract of that character could be treated as a contract "under the provisions of" the ordinance.

The ordinance of 1864 did not limit the power of the City to make any contract thereafter under some subsequent ordinance. It could not operate like a statute or constitutional provision in that regard. Council was at liberty to make a contract the next day with the same or other parties, utterly ignoring the ordinance.

In the case of *Strassheim* v. *Jerman*, 56 Mo., 104, the court said on page 106:

> "The fact that a general ordinance (No. 5399) was in existence, providing a specific mode by which the approval of Common Council of all contracts was to be expressed, did not in any way tend to prevent the adoption of a different method, by subsequent ordinance, for giving like expression to legislative approval; for, as a matter of course, the same power which ordained the enactment of the one ordinance still existed when the second was approved."

It is not a Question of Implied Repeal.

The ordinance of 1864 did not purport to regulate all future grants, it merely provided for the insertion of a 25 year limitation in any contracts made under *its* terms.

It was not necessary for the Council of Covington to repeal this ordinance, as suggested by the City Solicitor, by implication or otherwise, when it came to make the Abbott grant in 1869 under a new and different ordinance, setting forth in detail the form of contract to be signed by the parties.

The Ordinance of 1864 is not General.

It is idle, however, to treat that ordinance as being general. While its opening language, standing alone,

might suggest that it was to be general in character, the subsequent clauses and the surrounding circumstances show that it was a particular ordinance for a particular purpose.

It appears from the Council proceedings (App. 58; R., 39 *et seq*) that on November 10, 1864, the incorporators of the *Covington* Street Railroad filed their charter and statement of route and asked for a franchise. The Special Committee to which this application was referred, reported in favor of granting it in substance and Council concurred in the report and instructed the Committee on Law and the City Attorney "to report an ordinance granting the street railway company the franchise asked for in their petition agreeable to the report of the committee."

On December 15, 1864, this committee in response to the instruction just stated, reported the ordinance which we have under consideration. In other words, while the ordinance starts out with certain general language, it was an ordinance prepared under instructions for the purpose of granting to the *Covington* Street Railway Co. the franchise asked for in the petition referred to.

Section 11 of the ordinance instructed the clerk to advertise the ordinance. The advertisement in the Daily Times of January 4, 1865, and signed by the City Clerk of Covington is as follows (App. 65; R., 36):

> "The Legislature of Kentucky having incorporated the Covington Street Railway Company, the City Council of Covington, Ky., on the 15th day of December, 1864, passed an ordinance prescribing the terms upon which the City will grant the right of way and upon what streets the road may run, and offered the franchise to any responsible company who will pay into the City Treasury of Covington the largest bonus for

the same, and to the incorporators, any expense they may have incurred in making a survey of the routes above referred to together with the maps and estimates not exceeding $100.

"Sealed proposals will be received at the City Clerk's office up to February 1st, 1865. The ordinance above mentioned can be had at this office."

This ordinance was passed so that the particular franchise desired by The Covington Street Railway Co. could be offered for public bidding. The Covington Street Railway Co. is itself named in the ordinance and advertisement.

Only one grant is provided for, the routes are specified, the date of the advertisement and the papers in which it was to be made were specified and sealed proposals were to be received "up to the first of *February next* for the franchise *above named.*"

It was provided in Section 12 that the company to whom "this franchise is granted" may have the privilege of repairing the streets between the rails by bouldering, etc.

Not only were the special routes prescribed but it was provided that 2½ miles of road should be put in operation within twenty-four months after signing the necessary contract. Obviously this could refer only to the one franchise, because any subsequent franchise might cover a half mile or ten miles.

It was also stated that the incorporators of The *Covington* Street Railway Co. proposed to transfer their charter to the successful bidder and that in such case the bidder should pay the expense incurred by the incorporators in making the survey.

The ordinance is special in its character and was merely the basis for a contract then in contemplation between the parties.

This is further evidenced by the fact that after the bid on behalf of The *Covington* Street Railway Co. incorporators had been accepted an ordinance was passed under date of August 2, 1865, providing that at the end of the *Covington* Street Railway Co's. grant the same routes should again be offered, on the condition that the successful bidder should buy the equipment of the *Covington* Company. This ordinance of August 2, 1865, relates wholly to The *Covington* Street Railway Co., yet it is adopted and described in its own terms as an amendment to the ordinance of December 15th.

On page 20 of his brief, counsel claims that Section 8 of the ordinance of 1864, as originally reported, provided that the individual or company to whom the franchise should be granted, should sign a contract within 15 days "after the *passage of the ordinance*" but that Council amended this section so as to provide that the contract should be signed within 15 days after the *award*. He claims that this change indicated an intention to make the ordinance general in its operation. But there is an entirely different reason for the change.

Section 11 provided that the advertisement should continue and that bids should be received up to February 1, about six weeks from the time of the passage of the ordinance. Obviously the successful bidder could not be expected to sign a contract within two weeks after the passage of the ordinance. The time limit for the signing of the contract would, in any event, naturally date from the award, because after the bids were received an indefinite time might be taken by Council before making the award.

The impossibility of treating this ordinance as a general ordinance and applying it to the Abbott grant will appear if an attempt be made to give it a practical application as a general ordinance. Let us endeavor to apply it to the Abbott grant.

Section 3 provides that all tracks shall be of the gauge of 5 feet 2 inches, of the most approved rail, etc. Apply this to the Abbott grant and we find that the latter contains its own stipulations as to the gauge and makes its own provisions as to the rails.

Section 3 further provides for a $50,000 bond. No provision for a bond is made in the Abbott grant and none was required by the City or given by the parties. This is the strongest possible indication that the City of Covington did not regard the Abbott grant as being made under the provisions of the ordinance of 1864.

Section 4 of the 1864 ordinance provides that the grantee shall use

> "good cars with all modern improvements and should run cars as often as the public convenience may require."

The Abbott grant makes its independent provisions on these subjects in Section 8, providing that the cars should be "of the best style and class in use," etc.

Section 5 provides for a five cent fare. The Abbott grant makes its own provision as to fares in Section 8.

Section 6 provides that the franchise granted thereunder should not be assignable without the consent of the City Council. The Abbott grant is made expressly to Abbott, Redgate and Blick "their associates, successors and assigns."

Section 7 of the ordinance provides for the liabilities of the City of Covington and the company in case of any

of the occurrences therein stated. This subject is independently covered in the Abbott grant by Section 9.

Section 8 of the 1864 ordinance provides for the particular sort of contract to be signed. In the Abbott grant council made its own contract.

Section 9 of the 1864 ordinance contains a number of regulations as to the operation of cars. The Abbott grant contains its own regulations covering the same subjects and in a different way.

Section 10 of the ordinance of 1864 specifies the route and provides for public bidding. The Abbott grant specifies a different route and authorizes the contract without any public bidding.

Section 11 of the 1864 ordinance provides for advertisement, before the contract is made. In the Abbott ordinance council made its contract without any advertising.

Section 12 of the ordinance provides for bouldering between the rails, at the option of the grantee. The Abbott grant, Section 6, requires the street between the rails to be paved with the same material as that outside the rails.

Section 13 of the ordinance of 1864 provided a twenty-five year limitation for contracts made thereunder. The Abbott ordinance incorporated its own form of contract, without any such limitation, and granted "all the right and authority that the City of Covington has the capacity to grant" which was to be determined upon failure of performance by the grantee of its duties thereunder.

By Section 8 of the 1864 ordinance the road was to be completed within twenty-four months. By the first section of the Abbott grant the road was to be completed within periods of nine months and a year.

In the 1864 ordinance there was a bonus of so much per year to be paid by the grantee and the ordinary vehicle tax in addition, not higher than 10c. per car. In the Abbott grant there was no bonus provided, but a specific $25 license fee as to each car.

Suppose the appellee claimed by virtue of the ordinance of 1864 some right in addition to that which it obtained in the Abbott grant, on the theory that the Abbott grant was made under the terms and conditions of the ordinance of 1864. Could it be heard to make such claim, when the Abbott grant contained no reference to that ordinance, contained numerous inconsistent provisions and was not accompanied by the bond for $50,000 prescribed in that ordinance? Certainly not, and for the same reasons it can not be held to be limited in its rights by the terms of that ordinance.

This question was involved in an action brought by the City of Covington against the South Covington & Cincinnati Street Railway in the Kenton Circuit Court in 1910, to recover certain annual payments which the city claimed to be due in and after 1892 under an ordinance of July 7, 1887 (R., 84). The company claimed that such payments were discharged and released by a clause in Section 9 of the compromise ordinance of October 17, 1892 (App. 46), which stipulated certain annual payments "in lieu of any and all car licenses or *bonus.*" The company claimed that the payments provided in the ordinance of July 7, 1887, were the "bonus" referred to. The city claimed that the word "bonus" referred to the payments provided by the ordinance of December 15, 1864. The court rejected the city's argument and held in favor of the company, saying:

> "The ordinance of 1864 starts out in form as a general ordinance, but its subsequent provi-

> sions are applicable only to the grant over certain streets named and then platted and filed in the office, which was in contemplation at the time of the enactment, and no subsequent grant of any franchise to the three railway companies or to Abbott was made according to its provisions or upon its terms, but all upon ordinances and contracts contrary to it, and none of its provisions were applicable to the subsequent grants or the contract of 1892."

The Kenton Circuit Court was affirmed by the Court of Appeals, 147 Ky., 326, the court saying (p. 331):

> "The franchise granted under the ordinance of December 15, 1864, expired in 25 years, or on February 2, 1890, two years before the contract of October 7, 1892, was made; so it is evident that the bonus provided for under that franchise could not have been referred to."

This language, taken with the opening language of the court's opinion, shows clearly that the court regarded the contract of the Covington Street Railway Co. of August 15, 1865, as the only franchise which was granted under or related to the ordinance of December 15, 1864.

On this subject Judge Cochran said in his opinion (R., 169-171):

> "Seemingly the ordinance was in part of the character (general) claimed by the defendant. And for the sake of the argument it will be assumed that such was the case as to such part. Such, however, is not a complete description thereof. The 10th section ordained that the franchise for street railroads provided for according to the plan of the roads as laid down in the schedule of the Covington Street Railroad Company be granted to any responsible company which would pay to the city the largest

bonus for the same and to the incorporators of that company any expense they had incurred in making the survey of the routes together with maps and estimates not to exceed $100.00. The 11th section provided for the making of a certain advertisement that sealed proposals would be received until February 1st, 1865, for the franchise and that it would be awarded to the highest and best bidder at the first meeting of council thereafter. It concluded with this recital.

" 'It being understood that the present incorporators propose to transfer their rights and privileges in and to the charter obtained by them for a street railroad in this city, to the company or individual offering the largest bonus for the above mentioned franchise.'

"These provisions contemplated, that in any contingency, the franchise which was thus to be offered for sale and awarded to the highest and best bidder would go to the Covington Street Railway Company. It would go there either by that company becoming such bidder or by such bidder acquiring the right to such company and transferring his bid to it. By the 13th section of the ordinance it was provided that all contracts made under its provisions should be for the term and period of twenty-five years.

* * * * * *

"Now it is the contention of defendant that because this ordinance of December 15, 1864, whereby it was provided that all contracts made thereunder should be for the term and period of twenty-five years, was, at the time of the making of the grant to Abbott and associates, unrepealed, that grant was for a definite period of time and that twenty-five years from the date when it was made. It would seem not to require much argument to demonstrate the unsoundness of this contention. The mere statement of it

may be said to condemn it. Taking the ordinance to be, as it is claimed to have been, *i. e.*, as intended to limit subsequent grants of street railway franchises it must be conceded that the council of 1864 had no power to limit the action of the Council of 1869 and later years and that in determining the extent of the grant made by the latter council it is its intent and not that of the former council which controls. There is not a word in the ordinance of December 13, 1869, or the contract of December 23, 1869, made pursuant thereto referring to the ordinance of December 15, 1864, or which indicates that it was the intention that the grant to Abbott and associates should be affected to any extent by it. On the other hand that ordinance and contract are comprehensive in character and cover substantially all the details that one would expect to find covered in a grant of a street railway franchise. They cover substantially all the details covered making the same provisions and in others a different one. And over and beyond all this, whereas the ordinance of December 15, 1864, provided that all contracts made under it should be for twenty-five years, that of December 13, 1869, and the contract made pursuant to it, provided that the grantees should have all the authority and right which the defendant had capacity to grant, which was a right in perpetuity, and the only termination of that right called for was in the happening of the condition subsequent provided for."

THE TWO ORDINANCES ARE NOT IN PARI MATERIA.

This is not a case for the application of the doctrine that statutes or ordinances in *pari.materia* are to be read together.

In *People* v. *Aichinson*, 7 How Pr., 241, 245, it was said:

> "The word par must not be confounded with simile. It is used in opposition to it * * * intimating not likeness merely, but identity."

Private grants to two different grantees are not in *pari materia*; neither is an ordinance providing a specific method of making a grant and prescribing the terms of the contract therefor in *pari materia* with a subsequent ordinance making another private grant to a different person and setting forth in full the contract to be signed by the parties.

In *Fullinwider* v. *Southern Pacific R. Co. of California et al*, 229 F., 717, the Circuit Court of Appeals for the 9th Circuit said:

> "Those various railroad grants were not in *pari materia*. They did not relate to the same persons or things, or to the same class of persons or things. Each grant was distinct in itself, and each grant was distinct from the others. The grantee of one of those grants, in order to ascertain the nature of the rights and privileges conferred upon it, was not bound to refer to any other grant or act of Congress. Again, the rule of *pari materia* is a rule of construction only, and is resorted to for its assistance in determining the meaning of a doubtful statute. It has no application where the language of the statute is, as in the present instance, clear and unambiguous."

In *Hamilton* v. *Rathbone*, 175 U. S., 414, the court stated the iimitations upon the rule even as applied to general statutes.

> "The general rule is perfectly well settled that, where a statute is of doubtful meaning and

susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. * * * The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If Section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation."

II. THE GRANT OF JUNE 8, 1882.

It will be seen from the map (R., 32) that in the year 1882 The South Covington & Cincinnati Street Railway Co. was operating lines on Scott street and on what may be termed the Pike and Main Street Route.

The Covington Street Railway Co. was operating a line on Madison avenue, the only line which it had constructed under the contract of 1865, or at all.

The companies were operating independently and did not use any tracks or streets in common.

The access of The South Covington & Cincinnati Street Railway Co. to the Suspension Bridge was over Court Avenue by a perpetual franchise, like the remainder of its grants.

The Covington Street Railway Co. obtained access to the Bridge over Greenup and Second Streets and Scott

and Second Streets, a comparatively roundabout way.

In this state of affairs the City of Covington made a grant to the South Covington & Cincinnati Street Railway Co. of a right of way over all the streets named in the contract of The Covington Street Railway Co. (App. 69; R., 51-2), including those upon which that company had built and those upon which they had not built, the latter being the greater length.

The report of the Committee and the ordinance, with its title, are as follows (App. 27; R., 80):

> "To the Honorable President and Members of the City Council:
>
> "Gents— Your Com'tee. on Railroads and Bridges to whom the within communication was referred, would most respectfully report in favor of the passage of the accompanying ordinance, which provides for Court Avenue and Park Place, to be free from St. Railroad tracks.
>
> "ALEX DAVEZAC,
> "T. J. SMITH."

> "Report of Com'tee concurred in, and the accompanying ordinance, having been duly read, was passed, to-wit:
>
> "*An Ordinance granting the right-of-way over certain Sts. in the City of Covington, to the South Covington and Cincinnati St. Railway Co.*
>
> "Section 1. Be it ordained by the City Council of the City of Covington, that the South Covington and Cincinnati St. Railway Co. be and the same is, hereby authorized to contract with the Covington St. Railway Co. for the right-of-way over and along, the streets specified in the contract between the said Covington St. Railway Co. and the City of Covington, dated August 15th, 1865, and, the consent of the later com-

pany having been obtained, *the said South Covington and Cincinnati St. Railway Co. is hereby authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations, and restrictions contained in the ordinances, regulating its rights to the streets now occupied by said South Covington and Cincinnati Street Railway Co.* Provided however, and the rights hereby granted are upon this condition, that the said South Covington and Cincinnati Street Railway Co. shall within 30 days after the passage of this ordinance, remove its track on Court avenue and Park Place, and relinquish all rights, and claim to the same; but in the event the City authorities shall hereafter authorize any other street railway company or companies to occupy and use, said avenue, or Park Place, for street railway purposes, then, the said South Covington and Cincinnati Street Railway Co. shall have the same right to use, said avenue and Park Place, that it now possesses under existing ordinances; and provided, also, that said company shall have the right to make such curves and connections as may be necessary, to connect its track, with the tracks, on Greenup and Scott streets.

"Section 2. This ordinance shall take effect from and after its passage, provided that the said South Covington and Cincinnati Street Railway Co. shall within ten days from the date hereof, file their written acceptance of the same with the City Clerk."

This ordinance was accepted by the company and it relinquished its rights on Court avenue and changed its route to the bridge as provided in said ordinance and proceeded to construct its tracks and operate its lines

over the greater portion of the streets named in the contract of the Covington Street Railway Co.

Before considering the legal effect of these proceedings in detail, let us recur for a moment to the position of the parties.

The South Covington & Cincinnati Street Railway Co. was operating under a legislative charter, which created it a corporation with *perpetual succession* and with full power to construct, operate and maintain street railways in the City of Covington and vicinity, "along such streets and public highways in the City as Council shall grant the *right-of-way to.*" It thus had the perpetual power to carry on the street railway business in the City of Covington and it had a perpetual franchise over all the lines which it then operated in the City of Covington, including, its line over Court avenue by which it gained access to the Suspenson Bridge.

It had a direct legislative grant, unlimited as to time, over Fourth street in Covington, by amendment to its charter April 5, 1878 (App. 21; R., 74).

It had the power to operate on the same terms over any other streets in the City of Covington on which the City of Covington should grant it "the right-of-way." (App 18; R., 72.)

It is unnecessary to consider whether a right-of-way thus obtained was a municipal grant or a mere municipal consent to a legislative grant. The point is that the function to be performed by the City of Covington under the charter of this company was to grant a "right-of-way."

Let us consider the proceedings of Council in the light of these facts.

The ordinance which was passed was entitled—

> "An ordinance granting the *right-of-way* over certain streets in the City of Covington, to the

> South Covington & Cincinnati Street Railway Co."

This title meets exactly the requirements of the charter of The South Covington & Cincinnati Street Railway Co., under which that company was required to obtain from the City the right-of-way over streets.

Section 1 of the ordinance states that The South Covington & Cincinnati Street Railway Co. is authorized to contract with The Covington Street Railway Co. for the right-of-way over and along the streets specified in the contract of August 15, 1865,

> "and the consent of the latter company having been obtained, the said South Covington and Cincinnati Street Railway Co. *is hereby authorized* to occupy and use the streets specified in said contract for street railway purposes."

Even if the ordinance had stopped here the company would be entitled to claim the perpetual right-of-way under the decisions of the court, especially under the decision in *Boise Co.* v. *Boise City*, 230 U. S., 84, 90, where the grant was simply of the right to "lay and repair" waterpipes.

But this conclusion is made certain by the language which follows:

> "subject to the conditions, limitations and restrictions, contained in the ordinances regulating *its* rights to the streets now occupied by said South Covington & Cincinnati Street Railway Co."

The pronoun "its" naturally refers back to the preceding proper noun "The South Covington & Cincinnati Street Railway Co."—this as a matter of English con-

struction. This is made doubly sure by the repetition which immediately follows of the name of The South Covington & Cincinnati Street Railway Co.

If it had been intended to limit the South Covington Company's rights to the period set forth in the contract of August 15th, 1865, which had just been referred to, the contract would naturally have read "subject to the conditions, limitations and restrictions contained in said contract." Or, if it had been intended to subject the South Covington grant to the terms of the ordinance of 1864, that ordinance would naturally have been referred to.

Counsel attaches some significance to the plural form of the word "ordinances" as indicating that the ordinance of 1865 (which did not "regulate its rights") must be included to make the plural. But this position is not tenable. At the time of the ordinance of 1882 the pre-existing rights of the South Covington Co. were based on at least four ordinances of its own, to which we have heretofore referred. There is no adverse significance, therefore, in the plural of the word "ordinances."

The indication is clear, we think, from the ordinance itself that the South Covington Company obtained under this ordinance of 1882, its own independent grant to the streets named in the contract of August 15, 1865.

It had by its legislative charter, the perpetual right to do business in the City of Covington; it had by amendment to its charter a perpetual right on Fourth street from Scott street to the Licking river; it had from the City of Covington a grant of a perpetual right-of-way for all the lines which it was then operating.

The title of the ordinance and the ordinance itself show that a direct grant of a right-of-way was intended and the body of the ordinance subjects it to the limitations and restrictions applying to the other grants of the South Covington and Cincinnati Street Railway Company in the City of Covington.

As this court said in the case of *Louisville* v. *Cumberland Telephone Co.*, *supra*, on page 664:

> "It was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets."

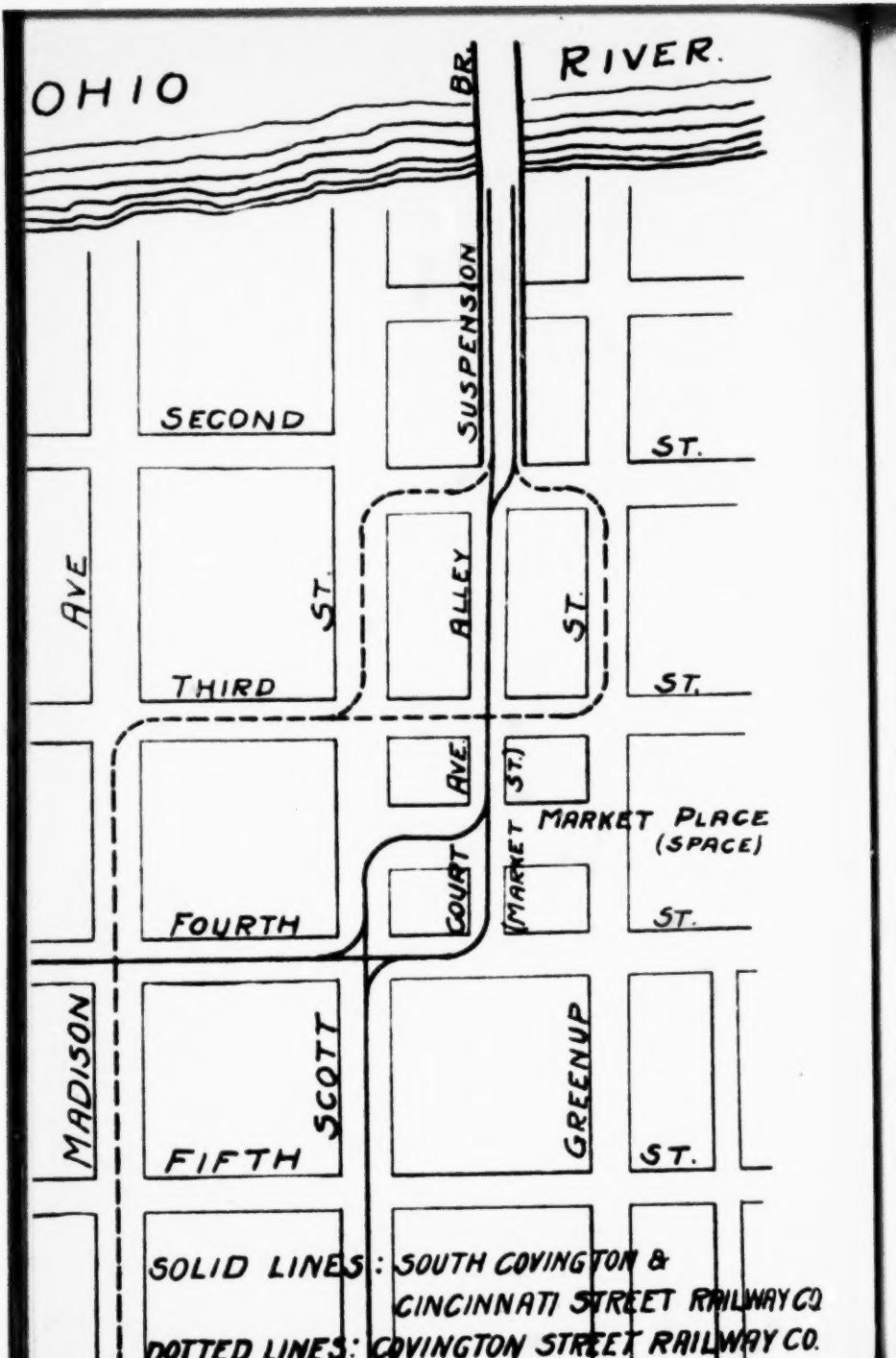
See, also, *Blair* v. *Chicago*, 201 U. S., 400, 482, where the court says:

> "the right granted must be construed with reference to the system of which it was made a part," etc.

This construction is borne out by the relations of the three parties. The South Covington & Cincinnati Street Railway Co. had the right under its charter, Section 4, to make a contract with the Covington Company for a right-of-way over its tracks without the consent of the city.

The city did not wish to make a grant to the South Covington & Cincinnati Street Railway Co. over the streets occupied by the Covington Company without the consent of the latter, which claimed an exclusive right on those streets under its charter, Sec. 6. (App. 57; R., 38.)

This transaction, therefore, is to be treated as a grant by the city and consent by the Covington Company, not as a grant by the Covington Company and consent by the


OHIO
RIVER.
BR.
SUSPENSION
SECOND
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AVE
ST.
ALLEY
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THIRD
ST.
AVE.
ST.
MARKET PLACE
(SPACE)
COURT
MARKET
FOURTH
ST.
MADISON
SCOTT
GREENUP
FIFTH
ST.
SOLID LINES: SOUTH COVINGTON &
CINCINNATI STREET RAILWAY CO.
DOTTED LINES: COVINGTON STREET RAILWAY CO.
SIXTH
ST.

city. If regarded in the latter aspect it would have been wholly unnecessary.

The consideration for the grant was the relinquishment of the perpetual right-of-way and the removal of the tracks on Court avenue.

The report of the council committee recommended "the passage of the accompanying ordinance which provides for Court avenue and Park Place to be free from street railroad tracks." (App. 27; R., 80.)

It can not be reasonably supposed that the company would relinquish such a valuable and important right-of-way and its only access to the Suspension Bridge and to Cincinnati for another less direct access to the Suspension Bridge having only eight years to run. (See map on opposite page.) Nor is it to be supposed that the company would accept a grant for only eight years over the streets in the City of Covington not then occupied by the Covington Street Railway Co., although named in its contract, and incur the expense (more than $150,000; see Abbott affidavit R., 31) of building its tracks thereon and increasing its equipment and expenses, for such a short period.

Counsel says on page 40 of his brief, that the dispute as to the duration of appellee's franchise is one of long standing and "dates back to the time it acquired the rights and franchises of the Covington Street Railway Co., certainly to the time it was authorized by ordinance approved August 5, 1889, to use electric power to propel its cars."

The earliest mention of any controversy as to the duration of appellee's franchise is in the ordinance of August 5, 1889, which was seven years after the grant of 1882, and the expenditure of $150,000 made thereunder.

Upon this subject Judge Cochran said (R., 173-174; 174-175):

> "Now it is defendant's contention that the sole thing which plaintiff acquired by this ordinance (June 8, 1882) was authority to purchase the unexpired franchise of the Covington Street Railway Company. But this position is not tenable. Several considerations are against it. If such was the sole purport of the ordinance why were not its terms confined to granting such authority? They were not so confined. It further authorized plaintiff, having obtained the consent of the Covington Street Railway Company, to occupy and use the streets specified in its contract. It provided that its occupation and use thereof should be subject not to the conditions, limitations and restrictions contained in that contract and the ordinance of December 15, 1864, pursuant to which it was made, but to those contained in the ordinances regulating 'its,' *i. e.*, plaintiff's right, to the streets then occupied by it. And it provided further that the rights thereby granted were granted upon condition that plaintiff should within thirty days after the passage of the ordinance remove its track on the connecting line with the Suspension Bridge and relinquish all right and claim thereto, which would leave to it as the only means of access thereto the roundabout way in which the Street Railway Company reached the Bridge. As heretofore held it had a perpetual franchise over this connecting line. It is inconceivable that plaintiff would have been willing or the defendant would have expected it to relinquish this valuable right in consideration of the right to purchase and use the Covington Street Railway Company's unexpired eight years franchise, so that on the expiration thereof it would have been without access to the bridge by the original line to which

it had a perpetual franchise as heretofore held. Particularly is this so when in fact it had the right to purchase that Company's unexpired franchise without the defendant's consent, the giving of authority to purchase being accounted for by the desire to remove any question as to its right and by the fact that the making of the purchase was made a condition of the making of the grant. But the title of the ordinance is conclusively against this contention. It makes no reference whatever to the matter of authority to make the purchase. The subject matter of the ordinance according thereto is a grant of a right of way over certain streets in the City of Covington to the plaintiff. It must be held, therefore, that this ordinance made an independent grant to the plaintiff of a right of way over the streets covered by the contract with the Covington Street Railway Company.

"It remains to determine the duration of this grant. Nothing is said expressly on this subject. According to the title of the ordinance the grant is of a right of way and according to its body it is of a right to use and occupy, without anything being said as to the duration of the right of way or the right to use and occupy. Nothing else appearing, this presents a case for the application in full force of the doctrine of the Morristown, Frankfort and Owensboro cases and according to it the grant is of a right in perpetuity."

* * * * * * * * *

"Besides plaintiff had perpetual succession and as heretofore held, it then had a perpetual franchise over certain streets of defendant, mainly under a grant from it, but including a grant as to a small portion thereof from the Legislature of Kentucky direct. The object intended to be accomplished was to get rid of

two independent lines and consolidate them in one line and system which object would be subject to frustration if thereby a perpetual franchise was not granted. I am, therefore, clearly of the opinion that under this ordinance as well as under the Abbott ordinances plaintiff acquired a perpetual franchise."

The ordinance of June 8th, 1882, was accepted in writing by the South Covington & Cincinnati Street Railway Co. (R., 31); the consent called for by the ordinance was given by the Covington Street Railway Co. Some time in the month of June 1882 the South Covington Company removed its tracks on Court Avenue and Park Place and commenced the use, in lieu thereof, of Greenup from Fourth to Second; Second from Greenup to Scott; Scott Street from Second to Fourth, and gave up its direct access to the Suspension Bridge and Cincinnati over Court Avenue and accepted in lieu thereof the access to the Suspension Bridge by way of Greenup, Second and Scott Streets as aforesaid; it also built its tracks and operated its cars over the greater portion of the streets covered by said ordinance of June 8, 1882, expending on account of construction a sum in excess of $150,000. (R., 30-31.)

Nine months later, namely March 20, 1883 (R., 81), the entire property of the Covington Street Railway Co. was offered for sale at a foreclosure sale and was bought by the South Covington Company. This sale covered principally the tracks, cars, equipment and real estate of the Covington Company. It included incidentally whatever franchise the Covington Street Railway Co. then owned because they were included in the offer for sale. However no claim of any franchise rights is made in this

case, or ever was made by plaintiff under said Master Commissioner's deed.

Numerous references are made in brief of counsel to the acquisition by appellee of the Covington Street Railway franchise, or the "Sherlock grant," as if the rights claimed by appellee under the ordinance of 1882 involved merely the unexpired term (eight years) of that grant.

For the reasons just stated these references and the implication contained therein are misleading and erroneous.

III. SUBSEQUENT ORDINANCES EXTENDING OR MODIFYING THE ROUTES.

These ordinances are mere extensions or modifications of the routes of the plaintiff upon the same terms as the existing routes, and do not affect, or purport to affect the duration of the grants.

1. Ordinance of August 28, 1884 (R., 82-84), authorizing the company to extend its double track on Madison Street from Twelfth Street south to the southern terminus of the route or the corporation line (at about Twentieth Street).

2. Ordinance of July 7, 1887 (R., 84-86), authorizing what was known as the Austinburg extension on Powell, Rickey, Oliver, Edward, Seventeenth and Scott Streets.

This ordinance substituted an annual payment to the city of $2,600 in lieu of all obligations for street repairs on the entire system.

3. Ordinance of August 5, 1889 (R., 86-88), authorizing the substitution of electric power and cars for horse power and cars. The substitution was made promptly by the company (R., 32).

4. Ordinance of January 3d, 1891 (R., 93), granting the company the right to lay and maintain tracks for street railway purposes to connect its Madison Avenue tracks with the car barn on the corner of State Street and Madison Avenue.

5. The Compromise Ordinance of 1892. (App. 34; R., 96.) This ordinance requires some preliminary explanation. In or about September, 1890, the City Council of Covington resolved that the rights of the South Covington & Cincinnati Street Railway Co. under the ordinance of June 8, 1882, had expired and authorized proceedings to offer for sale a new street railway franchise over those streets (R., 88-90).

The South Covington Company and the trustee of its bonds, immediately brought separate suits in the United States Circuit Court for the District of Kentucky to enjoin further proceedings, on the ground that the franchise of the South Covington Company had not expired.

This situation resulted, after extensive negotiations, in the compromise ordinance of October 7, 1892 (App. 34; R., 96). The ordinance speaks for itself; it provided in substance as follows:

(a) That the controversy between the City and the Company over the duration of the franchise should, by agreement, be postponed for a period of twenty (20) years from the date of the acceptance of the ordinance and that in the meantime the City would make no attempt to offer for sale any of the franchises then held or enjoyed by the Street Railway Company.

(b) A reduction of fares in Covington and between Covington and Cincinnati.

(c) The removal of the tracks from certain streets, notably Scott Street south of Fourth, and the double

tracking of other streets covered by pre-existing grants, notably Greenup Street; also two extensions of existing routes. The net result of these changes in trackage was to reduce the mileage of the South Covington Company in Covington from about 15 miles to 11-4/10 miles. The new mileage by way of extensions was very small (R., 142).

The cost of this work, by way of new construction and change of tracks, was about $250,000.

It was distinctly agreed that the compromise ordinance was a mere postponement of the controversy and not a waiver by either party of its claims. The ordinance expressly provided (App. 35; R., 97-98):

> "It is distinctly understood and agreed by said city and said company that this ordinance shall be held and construed to be only a compromise postponement of the assertion by the city of rights claimed by it, which rights are denied by said company, and are now the subject of litigation between the said city and the said company; but it is distinctly understood and agreed by both the said city and the said company that said city and said company will, if the court in which said suits are pending should hold that it has jurisdiction to hear and determine said suits, unite in asking said court to hear and determine said questions, notwithstanding the passage and acceptance of this ordinance, it being the purpose to have all questions between said city and said company determined in the court in which said suits are now pending, if said court decides that it has jurisdiction to hear and determine same, in order that both parties thereto may know their respective rights at the end of said period of twenty years. It is further distinctly understood and agreed by

> both the City of Covington and the said street railway company that neither the said city nor said company, by the passage and acceptance of this ordinance, in any way admits, waives, relinquishes, prejudices or affects their respective rights and claims as they respectively existed before the passage of this ordinance, so far as they relate to the matters involved in the said suits."

For some reason which does not appear of record, the suits in question were shortly thereafter dismissed without prejudice, probably because the making of the compromise rendered them moot cases.

6. Ordinance of April 26, 1894 (R., 105), authorizing the double tracking of a portion of Third Street.

7. On July 11, 1901 (App. 49; R., 106), an ordinance was passed and later accepted by the company reciting that the City of Covington had requested the company to change its tracks from Second Street between Scott and Greenup Street, Greenup between Second and Park Place, and Scott Street, between Second and Park Place (its access to the Suspension Bridge) back to Court Street and Park Place, the original access to the Suspension Bridge prior to the ordinance of June 8, 1882, and authorizing such change to be made.

The city desired to widen Court Street between Third Street and Park Place, and as appears from the ordinance, the South Covington & Cincinnati St. Ry. Co. gave the City a strip of land twelve (12) feet wide, between those streets for that purpose.

It was expressly provided by Section 5 (App. 53; R., 108-9) that the rights and obligations of the parties on the new streets should be the same as on the old. As

the company had a perpetual franchise on the old streets, its rights on the new streets were also perpetual.

The change of tracks provided for in the ordinance was made, the company thus giving up six or seven blocks in exchange for four.

A tax payer, Frank Woodall, brought suit in the State Courts to require the removal of the tracks, on the ground that the ordinance, not having been preceded by public offer and bidding, as required by the constitution, conferred no rights on the company. But the lower court and the Court of Appeals held that the ordinance was a valid modification of the existing franchise of the company. The Court of Appeals said, *Woodall* v. *South Covington & Cincinnati St. Ry. Co.*, 137 Ky., 512, 517:

> "When the ordinance was passed the street railway company had a franchise to operate its cars in the city of Covington. They then had the right to use for this purpose Scott, Greenup, and Second Streets, as their tracks were then laid. The purpose of the arrangement between the city and the street railway company was not to grant an additional franchise but simply to relocate the tracks of the street car company so as to be better for the city and better for the traveling public. The city secured the widening of Court street and the freeing for two squares of Greenup and Scott Streets, and the street railway company secured a better approach to the bridge. It gave up its rights in Greenup and Scott Streets, and also surrendered to the city the piece of land which it owned. The city has taken possession of the land and enjoys all the fruits of the contract."

The system established by the various grants above named was in existence and operation on July 14, 1913,

when the ordinance complained of in the bill (R., 109) was passed. It is that system which is described in the decree herein, and shown on the map attached to the Appendix.

ROSEDALE ORDINANCE.

Reference is made in the Record to the Rosedale ordinance, although it is not directly involved herein. This was a grant made in October, 1890, to the Cincinnati, Covington & Rosedale Railway Co. for a period of fifty years, over certain streets in the City of Covington (R., 90). The road was built by the South Covington Company and has since been operated by that company (R., 156) as a part of its system.

The ordinance complained of in this case, which undertakes to grant a new franchise covers the route of the Rosedale grant as well as of the South Covington grants proper.

The bill and the decree, however, relate only to the South Covington grants, heretofore described in detail.

THE ORDINANCE OF JULY 14, 1913, IMPAIRS THE CONTRACT RIGHTS OF APPELLEE.

If appellee has the rights claimed by it, the City does not deny that the grant of a franchise under the ordinance of July 14, 1913, would violate and impair them.

The routes set forth in that ordinance (R., 109, 110, 111) are exactly the routes operated by appellee, except about 2,000 feet on Western Avenue, where there are no tracks.

The undisputed evidence of Mr. Harton (R., 144, *et seq.*) shows that no additional street car lines could be

built or maintained thereon without destroying appellee's rights. (*Elliott on Roads and Streets*, Sec. 746 and cases; *Traction Company* v. *Transit Co.*, 69 O. S., 402, and cases cited.) Practically all of its eight miles of double track is on streets 40 feet or less in width. Its mileage of single track is on streets about 27 feet in width (R., 145). Practically all of the tracks, double and single, are located in the middle portion of the streets, as directed by the City Engineer. (R., 143-4.) The ordinance here in question provides for the tracks to be laid in the middle portion of the streets.

When the ordinance was adopted the plaintiff protested, claiming that it threatened an impairment of plaintiff's rights (R., 27) and the City Council responded by concurring in the report of its committee that

> "all of the franchise rights held or owned and operated or controlled by the South Covington and Cincinnati Street Railway Co. have expired; that the company is now operating on the streets in the City of Covington without license and without right."

Under Section 3, Article 2 of the ordinance plaintiff could not have made a successful bid without surrendering its claim of franchise rights.

As alleged in the bill, the purpose of the ordinance of 1913 was, not to provide a parallel system of street railway but to terminate the operation under plaintiff's franchises. The twenty year truce, provided in the ordinance of October 7, 1892 (App. 34; R., 96), expired in 1912, and the City was renewing its contest which had been suspended by that truce.

The bill alleges (R., 8) and the answer admits (R., 22) that the City of Covington claims that all of appellee's

franchises have expired and that the purpose of the ordinance of July 14, 1913, was to grant a new franchise in place thereof.

The court below said that "rightly interpreted the ordinance provides for the operation of another street railway on those streets in exclusion of plaintiff" (R., 164).

The ordinance presented a clear case for the interposition of the District Court as a Federal Court (*City Railway* v. *Citizens Railroad Co.*, 166 U. S., 557, 563), and as a court of equity (*Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S., 65, 82; *Roberts* v. *Louisville*, 92 Ky., 95, 107-8.)

We respectfully submit that the decree of the District Court should be affirmed.

RICHARD P. ERNST.
ALFRED C. CASSATT,
FRANK W. COTTLE,
Counsel for Appellee.

15

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CLERK.

No. 225.

Supreme Court of the United States.

OCTOBER TERM, 1917.

CITY OF COVINGTON,
Appellant,

versus

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,
Appellee.

Appendices to Brief for Appellee, The South Covington & Cincinnati Street Railway Company.

COURT INDEX PRESS, 646-650 Main Street, Cincinnati, Ohio.

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October Term, 1917.

CITY OF COVINGTON,

Appellant,

No. 225. *vs.*

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY,

Appellee.

Appendices to Brief for Appellee, The South Covington & Cincinnati Street Railway Co.

APPENDIX I.

COMPILATION IN CHRONOLOGICAL ORDER OF CHARTERS, ORDINANCES, ETC., SHOWING TITLE OF THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

1. The Abbott Grant and Supplements.

COUNCIL PROCEEDINGS, DECEMBER 13, 1869, ORDINANCE AUTHORIZING ABBOTT CONTRACT. (R., 60.)

Book H, page 610. Council meeting DECEMBER 13, 1869. The petition of E. F. Abbott, asking Council to take

from the table proposition of himself and others to build a street railroad and act upon the same, was taken up and the proposition, together with all papers concerning same, were read and discussed when the following ordinance was presented, which was read and the yeas and nays being called, passed, and is as follows, to-wit:

"An ordinance authorizing a street railroad on certain streeets.

Be it ordained by the City Council of Covington, that all the authority and right that the city of Covington has the capacity to be and the same is hereby granted to E. F. Abbott, J. B. Redgate and J. C. Blick, their associates, successors and assigns, to construct, hold and operate a street railroad upon and along Scott street, from Fourth street to Sixteenth street; Sixteenth street from Scott street to Madison street; Stevens street, from Sixteenth street to Austin street and Austin street from Stevens street to Williams street. In case the Covington Street Railway Company shall file with this council a written agreement, relinquishing their right of way on Greenup street from Fourth to Powell street and along Powell to Scott street in favor of Abbott and Company, then said Abbott and Company shall construct their road on Greenup street instead of Scott street, in accordance with their proposition for making the same on Scott street; also to construct, hold and operate a street railroad upon and along Fourth street from Scott street to Bakewell street, Bakewell street, from Fourth street to Riddle street; Riddle street from Bakewell street to Philadelphia street and on Philadelphia street, from Riddle street to the Lexington pike.

Said grant is upon condition and in consideration of the strict and faithful performance, by said grantees, of

all the terms, stipulations and covenants, contained in a certain written agreement made by and between said city and grantees, of even date herewith, and of record on the minutes of said council; and said grant shall determine upon failure of such performance."

AGREEMENT.

This Agreement, by and between the city of Covington, Kentucky, of the first part, and E. F. Abbott, J. B. Redgate and J. C. Blick, their associates, successors and assigns, of the second part, etc.

(Here follows form of agreement as subsequently executed December 23d, 1869, see *infra.*)

COUNCIL PROCEEDINGS, DECEMBER 23, 1869, ABBOTT CONTRACT. (R., 64.)

Book H, 632-637. DECEMBER 23, 1869.

Mr. Cushing presented the contract between the City of Covington and E. F. Abbott, S. J. Redgate, etc., for the right of way to construct, hold and operate street railroads on certain streets, which is as follows:

"AGREEMENT.

This Agreement, by and between the City of Covington, Kentucky, of the first part, and E. F. Abbott, S. J. Redgate and J. C. Blick, their associates, successors and assigns, of the second part,

WITNESSETH: That in consideration of the terms, stipulations and covenants hereinafter made by the said party of the second part, the said party of the first part

hereby agrees to grant unto the said party of the second part all the right and authority that the said party of the first part has the capacity to grant, to construct, hold and operate a street railroad upon and along Scott street, from Fourth street to Sixteenth street; thence upon and along Sixteenth street, to Madison street; also, along and upon Sixteenth street to Stevens street; then along and upon Stevens street to Austin street; thence upon and along Austin street to William street.

Said railroad on all of said streets, shall consist of a single track, upon which cars shall be run both ways, with suitable turn-outs for passing, not to exceed seventy-five (75) feet, at the intersection of other streets, with the streets above named, as hereinafter specified.

In consideration whereof, the said party of the second part, hereby covenants and binds itself with and to the said party of the first part, as follows, to-wit:

1st. The construction of said railroad shall be commenced on Scott street, within four months from the date hereof, and said railroad shall be completed and in operation on said street, from Fourth street to Sixteenth street within nine months from said date; and said railroad shall be completed and in operation on Sixteenth street, Stevens street and Austin street, within one year from and after the said streets shall have been graded and paved, or otherwise improved, respectively.

2d. The track of said railroad shall be of the gauge of five feet two inches, and the rails shall have a tram of four inches, and flange shall be the same as is on the Covington and Newport Railway, which flange shall be placed and kept on a level with the surface of the street, outside of the track, the surface of the street within the track to be kept level with the same.

3d. Said railroad shall conform to the grade of said streets, as now established, or hereafter to be established, and when the city council of said city shall change the grade of any of said streets, as the same is now or may hereafter be established, said railroad shall be made to conform to the grade so changed.

4th. The said party of the second part, shall, at its own expense, replace, in as good condition as it was before, any part of said streets that may be removed in the construction of said railroad and shall use due precaution to prevent the obstruction of public travel, while said railroad is being built.

5th. Whenever said city council shall ordain the improvement or the rebuilding or repair of any of said streets between the points hereinbefore designated for said railroad, or any part thereof, between said points, the said party of the second part shall pay into the treasury of said city, immediately after said work shall have been completed and accepted by said council, such portion of the cost and expense of said improvement, rebuilding or repair, as, according to the estimate of the city civil engineer of said city, shall bear the same ratio to the entire cost and expense of said work, that the width of the space between the rails of said road, including the turn-outs, and also, including the space between the turn-outs and the main track, may bear to the entire width of the street from curb to curb, inclusive of the curbing.

6th. The said party of the second part shall, at all times, at its own expense, keep in good order and repair, with the same material and in the same manner as the remainder of the streets, all the space between the rails of said railroad including the turn-outs and the space

between any turn-outs and the main track, and also the street outside of each rail, to the width of twelve inches therefrom.

7th. The said railroad shall be located along the center of said streets, and the necessary turn-outs shall be made at such intersections of other streets, and located in such manner, as the city civil engineer of said city, by direction of said city council, may designate.

8th. The cars used on said railroad shall be of the best style and class in use on street railroads, and shall each be accompanied by a driver and a conductor, and shall be of sufficient number and run with sufficient frequency to properly accommodate the public. The charge to each passenger on said railroad shall never be greater than five (5) cents for any distance within the city limits, except when cars may be chartered for specific purposes; and children and teachers, going to or returning from school, shall not be charged more than one-half the established fare.

9th. The said party of the second part shall hold said party of the first part harmless from all damages, or claim for damages, that may be sustained or made by said party of the second part, or by any other person, from the breakage of any cistern, sewer, water or gas pipe, or for delay in the transportation of any passenger that may be caused by the construction or repair of any cistern, sewer, gas or water pipe, or of any public work, or from any other cause; and the said party of the first part shall always have the right and privilege of temporarily obstructing or removing the tracks of said railroad, whenever and for such time, as may be necessary for the building, rebuilding or repairing of any cistern, sewer, culvert, water or gas pipe, street or other work

ordered or authorized to be done by said city council, but whenever any such obstruction or removal shall have been made, said party of the first part shall, as soon as practicable, at its own expense place the portion of said track so removed or obstructed in as good condition as it was before. Said party of the second part shall also hold said party of the first part harmless from all damages or claim for damages sustained or made by any person or property, by reason of the existence of said railroad, upon said streets, or by the cars or servants of said road.

10th. The said party of the second part shall pay into the treasury of the said city, on the first day of January in each year, the sum of twenty-five dollars ($25) as a license tax for each and every car that may have been used on said railroad at any time within twelve months, next preceding said date.

11th. Upon the failure or refusal of the said party of the second part to abide and perform any of the foregoing promises and covenants by it made in addition to the remedies established by law, it shall be lawful for said party of the first part, upon giving five (5) days written notice, setting forth the matter complained of, to the said party of the second part, through its superintendent or other principal officer or agent, to prevent the running of the cars on said railroad, by removing the track of the same.

In addition to the foregoing the said party of the second part hereby agrees that the following rules shall govern the operation of said railroad to-wit:

1st. No motive power except horse or mule shall be used on said railroad, and no car shall be drawn at a greater speed than six (6) miles per hour.

2d. No car shall be allowed to stop on a cross-walk, or at the intersection of a street, except to avoid collision, or to prevent danger to persons on the street.

3d. When the conductor of any car is required to stop at the intersection of a street to receive or leave passengers, the car shall be stopped, so as to leave the rear platform slightly over the crossing.

4th. The conductor and driver of each car shall keep a vigilant watch for teams, vehicles and persons on foot (especially ladies and children) either on the track or moving towards it; and upon the first appearance of danger the car shall be stopped within the shortest time and space possible.

5th. The conductor shall not allow ladies or children to get upon or leave the cars while in motion.

6th. The conductor shall announce to the passengers the names of the streets and the places where the car crosses any other street railroad track.

7th. The cars after sunset shall be provided with signal lights.

And in consideration of the said premises, the said party of the first part hereby agrees to grant to the said party of the second part, all the right and authority that the said party of the first part has the right to grant, to construct, hold and operate a street railroad with suitable turn-outs to be hereafter located by said council, upon and along the following streets; provided, the construction of the same be begun within thirty days and completed within nine months from and after the date of this contract. Said road to be built and operated upon the same terms and conditions expressed in this contract, as to other street railroads therein specified, except, only, as to the time within which said road upon the streets

hereinafter specified, shall be begun and completed, to-wit: Commencing at the intersection of Scott and Fourth streets, thence west along Fourth street to Bakewell street; thence south on Bakewell street to Riddle street; thence west on Riddle street to Philadelphia street; thence south on Philadelphia street to the Lexington Pike.

In testimony whereof, the parties of the first part by the president of its City Council, duly auhorized thereto, and the said party of the second part, by E. F. Abbott, S. J. Redgate and J. C. Blick, for themselves, their associates, successors and assigns, have hereunto set their hands at said city this 23d day of December, A. D. 1869.

HOMER HUDSON,
President C. C. C.
E. F. ABBOTT,
SAML. J. REDGATE."

Said agreement was referred to Committee on Law with privilege of reporting this evening.

Mr. Casey, Chairman of Committee on Law, presented the following report on the contract between the City of Covington and E. F. Abbott, S. J. Redgate and J. C. Blick, to construct, hold and operate street railroads on certain streets.

Contract correct and your committee recommend that the President be authorized to sign it in behalf of the City.

(Signed) JAMES B. CASEY,
Chmn. Com. on Law.

Report concurred in.

Charter of Covington and Cincinnati Street Railway Company, January 21, 1870. (R., 68.)

An Act

To Incorporate The Covington and Cincinnati Street Railway Company.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

1st. That Edward F. Abbott, S. J. Redgate, Samuel V. Reid and B. R. Morton and their associates, be and are hereby declared a body politic and corporate, with perpetual succession under the name and style of "The Covington and Cincinnati Street Railway Company," and in such name to have full power to contract and be contracted with, sue and be sued, construct and manage railways in said city of Covington and vicinity.

2d. The capital stock of the company shall be two hundred and fifty thousand dollars, divided into shares of fifty dollars each, to be paid for thus: one dollar per share on subscribing and the residue on such calls as the directors shall prescribe; and if any call shall remain unpaid thirty days after due, the same may be collected by suit, or the company may forfeit the subscription, and all payments made thereon for the benefit of the corporation after thirty days notice to that effect being published in some newspaper or served upon the subscriber or his successor.

3d. That the persons named in the first section of this act, or any three of them, are authorized to receive subscription to said capital stock at such time and place or places as they shall deem expedient, and receive the

advanced installments; and whenever not less than five hundred shares shall be subscribed, may hold an election for five directors and shall preside at the same and give certificates to the persons elected directors. The election shall be by ballot, and stockholders may vote in person or by proxy and shall be entitled to one vote for each share held by him, and a plurality shall elect.

4th. The directors shall organize by electing one of their body president, and any three shall constitute a quorum for business. The board may appoint such officers, agents and employes as may be deemed necessary or proper, and prescribe their duties and fix their compensation; may make and ordain all necessary by-laws and rules for the management of the affairs of the company and its business, in the discretion of the president and directors; determine the time and place for holding the annual elections and from time to time may declare such dividends of the business of the company as the net profits shall justify.

5th. The business of said corporation shall be the construction and operation of street railways in said city and vicinity along such streets and public highways in the city as the council may grant the right of way to, and along such roads out of the city as the companies owning the road may cede the right to use of so much of the road or grade; and said city and such companies are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by mutual agreement, then the company may proceed to condemn the same, as in case of turnpikes and plank roads; when the track may be prepared for use and cars run thereon the company shall have the right to charge reasonable

rates of fare for passengers, which shall be payable on entering the cars; and if any passenger shall fail or refuse the payment, such passenger may be excluded from the car, *provided*, the company shall have the rate in print posted up in the car to plain view.

6th. The company may purchase and hold such real and personal estate, routes and railway tracks as may be deemed requisite for its use, and sell, exchange and convey the same at pleasure; and may erect or purchase such buildings, car-houses, shops, stables and offices for the use of the company as the wants and conveniences of the business shall seem to demand.

7th. Authority is hereby given to the company to connect with and use the track of any other railway company in said city and vicinity on equitable terms; that is, to pay such company fair compensation for the use of such tracks; and it may also borrow money on credit of the company and issue its bonds therefor, bearing interest not exceeding ten (10) per cent. per annum, and secure the payment of the same by a mortgage upon the property, rights and franchises and incomes of the corporation: *provided*, the bonds shall be payable after date at some particular place, and of not less denomination than one hundred dollars, and there shall be coupons attached thereto.

8th. The president shall be the chief officer of the company and shall perform such duties and possess such powers and receive such salary or compensation as the board may from time to time prescribe.

9th. This act shall be in force from its passage.

Approved, January 21, 1870.

Ordinance, December 28, 1874, Extending Time and Modifying Route. (R., 70.)

Book L, page 13. December 28, 1874.

An ordinance to extend the time to begin and complete certain street railway.

Be it ordained by the City Council of the City of Covington: That the time for the commencement of the work of constructing the street railway lines, set forth in the contract dated December 23, 1869, between said city of the first part, and E. F. Abbott, S. J. Redgate of the second part, be and the same is hereby extended to said Abbott and such associates as may become interested with him, for the time of six months, from the passage hereof, upon the terms, conditions and stipulations contained in said contract, as if the same were herein repeated. The said Abbott and his associates incurring all the liabilities and responsibilities therein provided and to enjoy all the rights and privileges therein granted.

2d. The route beginning at the corner of Fourth and Scott streets and running west of Fourth street, to be modified as follows, to-wit: To extend west on Fourth street to Main street and south on Main to Pike, east on Pike and crossing Madison to Cooper, thence to Scott and north on Scott street to beginning.

3d. This ordinance to take effect from its passage, provided said Abbott shall file within ten days in the city clerk's office his written acceptance of the provisions of this ordinance, continuing the obligations of his part of said contract and binding himself to complete said road within nine months from the passage of this ordinance and if not so completed the contract to be void.

ORDINANCE, JANUARY 28, 1875, MARKET STREET TO SUSPENSION BRIDGE. (R. 76.)

Book L page 51. JANUARY 28, 1875.

An ordinance to authorize the connection by street railway between the track on Fourth street in Covington and the Cincinnati Bridge.

Be it ordained by the Council of the City of Covington: That E. F. Abbott, his associates and assigns, upon completion of the street railway, on the Fourth and Main street route, granted by ordinance, dated December 28th, 1874, be and are hereby authorized to construct a line of street railway, from Fourth street north through Market street, and the alley immediately north thereof, to and across Second street, with necessary turnouts to make connection between the tracks crossing the Suspension Bridge, and that traversing Fourth street, the track to occupy the center of said street and alley, and to be constructed after the same manner as the tracks along other streets, which said Abbott, associates and assigns are authorized to construct. Provided, that in case of change in the width or grade of said street or alley, the said Abbott, associates or assigns, shall at his or their own expense make such change in the location or grade of the track as the City Council may direct.

DEED FROM ABBOTT AND ASSOCIATES TO THE COVINGTON AND CINCINNATI STREET RAILWAY CO., MAY 1, 1875. (R. 71.)

WHEREAS, By virtue of an act of the Kentucky Legislature entitled: "An act to incorporate The Covington and Cincinnati Street Railway Company," approved January 21, 1870, Edward F. Abbott, S. J. Redgate and

Samuel V. Reid and B. R. Morton, and their assaciates, were incorporated under the above corporate name and authorized to construct and manage railways in Covington and vicinity, and said company have organized by the stockholders electing a board of directors.

And Whereas, The City Council of Covington, by a contract dated December 23d, 1869, granted the right of way to said Abbott and Company to construct a street railway along certain streets in said city.

And Whereas, The time for exercising said privileges elapsed without any work being done, and said City Council passed an ordinance on the 28th of December, 1874, entitled: "An ordinance to extend the time to begin and complete certain street railways," wherein all the rights granted by said contract of December 23d, 1869, were granted to said Abbott and his associates and assigns together with other privileges.

And Whereas, By another ordinance passed January 28th, 1875, by said Council, authority was given to said Abbott, his associates and assigns, to connect the track of said railway from Fourth street through Market street and the alley north thereof, with the tracks on the Suspension Bridge, and the said corporation having organized for the purpose of constructing said street railway lines are authorized by their charter and the said ordinances and obtained from said Abbott and associates all their rights and privileges under said charter and under said contract and said ordinances.

Now, Therefore, For and in consideration of the sum of one dollar, the said Edward F. Abbott, Samuel V. Reid and B. R. Morton, hereby sell, assign, transfer and set over to said Covington & Cincinnati Street Railway Company all the rights, privileges, franchises and interest which they or either of them have in and to said

charter, contract and ordinances and all interest vested in them thereby, the said corporation assuming all the liabilities and obligations of said grantors and agreeing to save them harmless in the premises.

To have and to hold the said rights and privileges and franchise to the only use, benefit of said street railway company, its successors and assigns, free from the claims of the grantors herein.

In Witness Whereof, They have hereunto subscribed their names this 1st day of May, 1875.

E. F. Abbott,
S. V. Reid.
B. R. Morton.

Ordinance Recognizing Ownership of Street Railway by Covington & Cincinnati Street Railway Co. June 24, 1875. (R., 75.)

An Ordinance Granting the Right of Way to the Covington and Cincinnati Street Railway Company for a Street Railway Track on Lower Market Space, Scott and Fourth Streets in Covington.

Be it Ordained by the City Council of Covington:

That the Covington & Cincinnati Street Railway Company be and are hereby authorized to connect their track on Market Street with that on Fourth Street, by running West on the North side of Market Space to Scott Street; thence south on Scott Street to Fourth; thence east on Fourth to Market Street, and the right of way through said streets is hereby granted to said railway company for said purpose, for the period of five years. That said tracks be constructed in the same manner as

the tracks which they connect are required to be constructed, and that they be held on the same conditions. Provided, however, that said company shall keep the streets in good repair between the rails (with like material as the streets) of said tracks and on the outside for a distance of twelve inches from the rails on both sides thereof, and where a track is already laid in any part of said way hereby granted, then one rail of the track now authorized shall be laid in the center of the existing track, and in the event of the removal of the old market house, now standing on said space, the city reserves the right to require the removal of this track to the center or such other position in said Market space, as shall be deemed proper by Council, at the expense of said railway company, and that the city shall incur no liability whatever on account of said grant.

Charter of South Covington and Cincinnati Street Railway Company, January 25, 1876. (R. 72.)

An Act to Incorporate The South Covington and Cincinnati Street Railway Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That E. F. Abbott, B. R. Morton, W. O. Ford and S. C. Hermes, or those of them who shall act, their associates, successors or assigns, be, and are hereby, created a body corporate and politic, with perpetual succession, under the name and style of The South Covington and Cincinnati Street Railway Company, and in such name to have full power to contract, and be contracted with, sue and be sued, construct, operate and manage street railways in the city of Covington and vicinity.

Section Two. Said company shall have a capital stock not to exceed two hundred thousand dollars, divided into shares of fifty dollars each.

Section Three. The business of said corporation shall be the construction, operation and management of street railways in the city of Covington and vicinity; and along such streets and public highways in the city as the council shall grant the right of way to; and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of; and said city and such companies or corporations are hereby authorized to grant the right of way, and to agree to the necessary grade for the railway tracks; and when the right of way can not be obtained by agreement, then the said company may proceed to condemn the same as in the case of turnpike, gravel and plank roads; and it may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or interest therein, in Covington, Cincinnati, Newport, or vicinity; and may also in like manner dispose of any such rights and privileges to any other company or companies that shall undertake to operate their road or any part or lines thereof.

Section Four. Authority is hereby given to the company to cross the tracks of any other company; also to connect with and use the track of any other railway company in the city of Covington and vicinity, on equitable terms—that is, to pay such company a fair compensation for the use of such track. In the event a mutual agreement can not be effected with such other company for the use of such part of its track as desired, then such use may be condemned by proceedings under a writ of *ad quod damnum*, as provided in chapter 110, entitled "Turnpike, Gravel and Plank Roads" in the General Statutes.

Section Five. The Board of Directors shall consist of not less than three nor more than five, as shall be determined from time to time by the By-Laws that may be ordained by the Board of Directors, also which shall prescribe the time, manner and place of their election. Each share of stock shall entitle the holder to one vote, either by himself or proxy, in writing, and the person having the highest number of votes shall be declared elected.

Section Six. The corporators in the first section mentioned, their associates, successors or assigns, shall organize said company, and shall constitute the first Board of Directors. The board shall elect one of its members president, and such other officers as may be deemed advisable; and may fill all vacancies occurring in the board; and may appoint such agents and employes as may be desired, and prescribe their duties and fix their compensation; and may make all necessary by-laws and rules for the management of the company; and may purchase and hold such real and personal estate, routes, railway tracks, bonds, notes or obligations as may be deemed requisite for its use, and sell, convey and exchange the same at pleasure; and may dispose of stock from time to time, and reissue such as may be acquired in the course of its business, whether taken for liens, debts or otherwise; they may borrow money on the credit of the company, at a rate of interest not exceeding ten per cent. per annum, and may execute the notes or bonds of the company, and sell or dispose of the same, when deemed advisable, for the use and benefit of the company; and to secure the payment thereof, or of any indebtedness of the company, may mortgage or pledge the whole or any part of the property, income and franchises of the company.

Section Seven. The company shall have the right to charge reasonable rates of fares for passengers, which

shall be payable on entering the cars; and if any passenger shall fail or refuse the payment such passenger may be excluded therefrom, provided the company shall have the rate in print posted up in the cars.

Section Eight. The president shall be the chief officer of the company, and shall perform such duties, and possess such powers, and receive such salary or compensation as the board may from time to time prescribe.

Section Nine. This act shall be in force from its passage.

Approved January 25th, 1876.

Amendment to Same, March 13, 1878. (R. 73.)

An Act to Amend the South Covington and Cincinnati Street Railway Charter.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That the said company be, and is hereby, authorized and empowered to construct, extend and operate its line of railway along Fourth street, from Scott street to the Newport and Covington Bridge over the Licking river, and to cross the same on such terms as may be agreed upon by and between said bridge company and this street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as it may designate, and as may be agreed upon by and between said city and said company, and to extend its lines to and across the Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully empowered to make such contracts and agreements with this street railway company.

Section Two. Said company may construct and operate any branch or branches to its main line which may be deemed advantageous; and may change lines, or consolidate them, or change locations of branches, remove tracks to new locations, the right of way being first obtained therefor.

Section Three: In the event of a failure to make an agreement with said bridge companies, or either, for the right of transit across the same with said railway of this company, or to effect an agreement with the proper authorities of either of said cities for the right of way, or with other railway companies for the right to cross, connect with, or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, street, or railway track, by proceedings by writ of *ad quod damnum*, as provided in chapter 110 of the General Statutes, entitled "Turnpike, Gravel and Plank Roads."

Section Four. This act shall be in force and take effect upon and after its passage.

(Superseded by the following):

AMENDMENT TO SAME, APRIL 5, 1878. (R. 74.)

(Legislative Grant on Fourth Street.)

An Act to Amend the Charter of the South Covington and Cincinnati Street Railway Company.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

Section One. That the said company be, and is hereby, authorized and empowered to construct, extend and operate its line of railway along Fourth street, from

Scott street in the city of Covington to the Newport and Covington Bridge over the Licking river, and to cross the same on such terms as may be agreed upon by and between said bridge company and said street railway company; also to construct and operate its lines of street railway along such streets in the city of Newport as may be agreed upon by and between said city and said company, and to extend its lines to and across the Newport and Cincinnati Bridge by agreement with said bridge company. The said cities and said bridge companies are fully authorized to make such contracts and arrangements with said street railway company.

Section Two. Said company may construct and operate any branch or branches to its main line within the city of Newport which may be deemed advantageous, and may change such lines or consolidate them, or change the location of any of its branches, or remove its tracks to new locations, the right of way therefor having been first obtained from said city. Said city of Newport shall prescribe the terms and conditions upon which said railway company may operate and control said line, branches, changed lines and consolidations, constructed in said city of Newport, under the authority of this amendment.

Section Three. In the event of a failure to make an agreement with said bridge companies, or either of them for the right of way across the same with said railway company or with other railway companies for the right to cross, connect with, or use the track, or portions thereof, of such company, in either of said cities, then this company may proceed to condemn said right to said bridge, or railway track, by proceeding by writ of *ad quod damnum,* as provided in chapter 110 of the General Statutes, entitled "Turnpike, Gravel and Plank Roads."

Section Four. The cars used on said lines of railway shall not be operated or propelled by steam power; the tracks thereof shall conform to the grades of the streets on which they are respectively located, and during the construction or repair, or reconstruction of such streets shall be taken up if necessay and replaced at the cost of said railway company; and said company shall have no claim for damages, by reason thereof, against said city of Newport, nor for any delay or hindrance thereby occasioned to the running of the cars of said railway company.

Seection Five. This act shall be in force from its passage.

Approved April 5th, 1878.

Deed from Covington and Cincinnati Street Railway Company to The South Covington and Cincinnati Street Railway Company, December 20, 1876. (R. 76.)

Whereas, All the stockholders of this company have consented to and authorized the sale and transfer of all the property, rights, credits, effects, right of way, grants and privileges of the same to The South Covington and Cicinnati Street Railway Company, and negotiations therefor having been effected with said company, by which the terms have been fully agreed upon:

Therefore, The Covington and Cincinnati Street Railway Company, a corporation under the laws of Kentucky, being empowered hereto, for and in consideration of the sum of five dollars in hand paid and of other valuable considerations, also of the undertakings and covenants of the said South Covington and Cincinnati Street Rail-

way Company, hereinafter mentioned, does hereby grant, bargain, sell, convey and confirm to the said South Covington and Cincinnati Street Railway Company, a corporation organized under an act of the Legislature of said commonwealth, approved January 25th, 1876, all the estate, real, personal and mixed of the grantor located in Kenton County, Kentucky, including rights of way, grants, railway tracks, turn-outs, turn-tables, land lots, buildings, stables, offices, cars, horses, mules, harness, tools, and all and every article and species of property, rights and credits of or belonging to the said Covington and Cincinnati Street Railway Company, or to which it has or is entitled to any interest or claim whatever, including all benefit of the contract with the Cincinnati Consolidated Street Railroad Company.

To have and to hold same and every part or parcel thereof, right thereto or interest therein, unto the only proper use and benefit of the said South Covington and Cincinnati Street Railway Company, its successors and assigns forever.

And the Covington and Cincinnati Street Railway Company covenants to and with the said South Covington and Cincinnati Street Railway Company, that it is the true and lawful owner and possessor of the said property and premises, rights and privileges, and has good right and full power to sell and convey the same in the manner and form herein expressed, and further that it will warrant and forever defend the title and right to said property and premises as free from and against the claims of all persons and parties whomsoever, except as to the existing mortgage bonds outstanding against the company and a balance of the purchase money owing upon a lot on Scott and Sixteenth streets. And the said South Covington and Cincinnati Street Railway Com-

pay does hereby covenant and agree to and with The Covington and Cincinnati Street Railway Company to observe, keep and fully perform all the obligations and undertakings of The Covington and Cincinnati Street Railway Company to the City of Covington in reference to the right of way in the streets of said city; and the grantee herein also covenants to pay off and discharge said mortgage bonds and said purchase money for the lot on the corner of Scott and Sixteenth streets, and to pay all other legal claims against and liabilities of the grantor now existing; and to save said Covington and Cincinnati Street Railway Company harmless and fully indemnified in the premises.

In Witness Whereof, The said Covington and Cincinnati Street Railway Company and The South Covington and Cincinnati Street Railway Company, by order of their respective Boards of Directors, have hereunto subscribed their corporate names and affixed the corporate seals by their respective presidents and attested by their several secretaries the date aforesaid.

The Covington and Cincinnati Street Railway Co.,
By E. F. Abbott,
President.

Attest: James A. Collins,
Secretary.

South Covington and Cincinnati Street Railway Co.,
By W. O. Ford,
President.

Attest: George M. Abbott,
Secretary.

Ordinance, October 13, 1881—Double Track on Court Avenue—Recognition of Abbott Grant. (R. 79.)

Book O, page 681. October 13, 1881.

Whereas, The South Covington and Cincinnati Street Railway Company has laid and is now using a single

track railway in the alley running from Third street, north to the Covington and Cincinnati bridge, and it is proposed to widen said alley into an avenue which will afford ample room for a double track, which it is believed will promote the convenience of the general public; therefore,

Be it Ordained by the City Council of Covington, That the South Covington and Cincinnati Street Railway Company, be, and the same is hereby, authorized to lay a double track on said proposed avenue, from Second street to Market space, so as to make connection with its track as now laid on Market space and Market street, and to use and to enjoy the same, as well as its track on Fourth and Scott streets, upon the same terms and conditions as it is authorized to use and enjoy the remainder of its track, by the provisions of a certain agreement entered into between E. F. Abbott, etc., and the city of Covington, on the 23d day of December, 1869.

Provided, However, That the said South Covington and Cincinnati Street Railway Company shall file with the city clerk its written acceptance of this ordinance within ten days after its passage.

2. Grant June 8, 1882.

Report and Ordinance, June 8, 1882. Grant Over Covington Street Railway Co. Routes. (R., 79.)

A regular meeting of the City Council of Covington, was held at the Council Chamber, Thursday evening, June 8th, 1882, President Prague in the chair and all members present.

To the Hon. President and Members of the City Council:

Gents—Your Committee on Rail Roads and Bridges to whom the within communication was referred, would most respectfully report in favor of the passage of the accompanying ordinance, which provides for Court Avenue and Park Space to be free from St. Railroad tracks.

ALEX. DAVEZAC,
T. J. SMITH.

Report of Committee concurred in, and the accompanying ordinance, having been duly read, was passed, to-wit:

An Ordinance granting the right of way over certain streets in the city of Covington, to the South Covington and Cincinnati Street Railway Company.

Sec. 1. *Be it Ordained by the City Council of Covington,* That the South Covington and Cincinnati Street Railway Company be, and the same is hereby authorized to contract with The Covington Street Railway Company for the right of way over and along the streets specified in the contract between the said Covington Street Railway Company and the city of Covington, dated August 15th, 1865, and, the consent of the latter, company having been obtained, the said South Covington and Cincinnati Street Railway Company is hereby authorized to occupy and use the streets specified in said contract for street railway purposes, subject to the conditions, limitations and restrictions contained in the ordinances regulating its right to the streets now occupied by said South Covington and Cincinnati Street Railway Company. *Provided, However,* and the rights hereby granted are upon this condition: That the said South Covington and Cincinnati Street Railway Company shall within thirty days after the passage of this ordinance remove its track on Court avenue and Park place and relinquish all rights

and claim to the same; but in the event the city authorities shall hereafter authorize any other street railway company or companies to occupy and use said avenue or Park place for street railway purposes, then the said South Covington and Cincinnati Street Railway Company shall have the same right to use said avenue and Park place that it now possesses under existing ordinances; and *Provided*, also, that said company shall have the right to make such curves and connections as may be necessary to connect its track with the tracks on Greenup and Scott streets.

Sec. 2. This ordinance shall take effect from and after its passage, provided that the said South Covington and Cincinnati Street Railway Company shall within ten days from the date hereof file their written acceptance of the same with the city clerk."

JULY, 1882, CONTRACT BETWEEN COVINGTON STREET RAILWAY COMPANY, AND SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY. (R., 34.)

THIS AGREEMENT, entered into between the Covington Street Railway Company, a corporation under an act of the General Assembly of the Commonwealth of Kentucky, approved February 9th, 1864, of the first part, and The South Covington & Cincinnati Street Railway Company, a corporation under an act of the same General Assembly, approved January 25th, 1876, of the second part, *witnesseth*:

That the party of the first part, in consideration of the covenants to be performed and money to be paid by said party of the second part as hereinafter stipulated, hereby grants permission to the said party of the second part

to construct and operate street railways over the streets specified in the following routes, so far as said party of the first part may do so under the laws of Kentucky, and the ordinances of the city of Covington, the said routes being designated as follows in a certain agreement between the said party of the first part and the city of Covington.

GREENUP STREET ROUTE, OR NO. 1.

Commencing at the corner of Scott and Front running south to Third, east on Third to Greenup, south on Greenup to Powell, east on Powell to Madison, returning over the same route to Third street, continuing north on Greenup street to Second, west on Second to Scott, to same place of starting; to be a single track route with turn-outs at the following intersections of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

MADISON AVENUE ROUTE, OR NO. 2.

Commencing corner of Scott and Front, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line, a double track on Madison from Eighth to Third, turn-outs at the following intersections of streets with Madison: Robbins, Twelfth, Fourteenth and Fifteenth streets.

PIKE AND BANKLICK STREET ROUTE, OR NO. 3.

Running over the Madison street route to Sixth street, thence on Sixth to Washington, south on Washington to

Pike, west on Pike to Banklick, south on Banklick to Fifteenth, east on Fifteenth to Madison, a double track on Pike from Banklick to Washington, on Washington, to Sixth and on Sixth to Madison, and turn-outs at the following intersections of streets with Banklick: Eleventh, Thirteenth and Fifteenth streets.

Main Street Route, or No. 4.

Running over that portion of the Madison street route from corner of Front and Scott streets to Third and Madison, west on Third to Main, south on Main to Pike, west on Pike to York, a single track with turn-outs at the following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York, returning over the same route.

Third Street Route, or No. 5.

Running over the Main street route to Main, west on Third to Bullock, south on Bullock to Second, returning over the same route, a single track with turn-outs at the intersections of the following streets: with Third, Philadelphia and Bullock.

And the said party of the second part, for the privileges herein granted, hereby covenants to pay at the end of each and every year, for a period of eight years, beginning August 15th, 1882, the sum of two hundred and fifty dollars to the city of Covington, said city having duly authorized said party of the second part by ordinance, approved June 8th, 1882, to use the streets men-

tioned in said routes for street railway purposes, and the said party of the first part having obligated itself to pay the said sum of two hundred and fifty dollars annually until August 15th, 1890, to said city in consideration of the right of way over said streets, as will appear by reference to said agreement between said party of the first part and said city, dated August 15th, 1865, the payment of which sum for the year ending August 15th, 1883, and annually thereafter, until the expiration of the said term, is assumed by said party of the second part.

It is further expressly agreed that the privilege herein granted shall not be regarded as an abandonment on the part of the said party of the first part of its right to construct and operate street railways over said streets.

In Witness Whereof, said companies have caused their corporate names to be subscribed by their president and their corporate seals to be affixed, attested by their respective secretaries, this —— day of July, 1882.

COVINGTON STREET RAILWAY COMPANY,
By JOHN A. WILLIAMSON, *President.*
B. R. MORTON, *Secretary.*

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
By E. F. ABBOTT, *President.*
JAS. A. COLLINS, *Secretary.*

3. Ordinances Extending or Modifying Routes.

ORDINANCE OF AUGUST 28, 1884. (R., 82-84.)

This ordinance authorized the company to extend its double track on Madison Street from Twelfth Street south to the Southern terminus of the route or the corporation line (at about Twentieth Street).

ORDINANCE OF JULY 7, 1887. (R., 84-86.)

This ordinance authorized what was known as the Austinburg extension on Powell, Rickey, Oliver, Edward, Seventeenth and Scott Streets. It substituted an annual payment to the city of $2,600 in lieu of all obligations for street repairs on the entire system.

ORDINANCE OF AUGUST 5, 1889. (R., 86-88.)

This ordinance authorized the substitution of electric power and cars for horse power and cars.

(The last three ordinances mentioned were in the nature of extensions or modifications of the existing routes and upon the same terms and conditions and for the same duration as the existing grants.)

PROCEEDINGS OF COUNCIL IN SEPTEMBER, 1890, FOR RE-SALE OF COVINGTON STREET RAILWAY ROUTES. (R., 88.)

Record W., p. 18, September 11, 1890.

WHEREAS, the franchise of The South Covington & Cincinnati Street Railway Co., or that part of it known as the Covington & Cincinnati Railway Co.* (White Line) expired August 15, 1890, last month;

Therefore be it resolved by the City Council of Covington that the matter of advertising the said Covington & Cincinnati Railway Co.* (White Line) Franchise for sale be referred, to a Special Committee of three in conjunction with Committee on Law and City Solicitor.

(Signed) T. W. SANFORD.

Adopted, and Messrs. Sandford, Holtrup and Von Bokern appointed on said Special Committee.

* An error in name. See Report below.

Sept. 18, 1890, page 43, Book W.

Mr. Sandford, Chairman of a Special Committee, presented the following report:

To the Council:

Your Special Committee and Committee on Law, to which was referred the resolution of T. W. Sanford with reference to the matter of advertising for sale the "Franchise" of the Covington Street Railway Company, report that they have examined into the rights of the Street Railway Company to the routes granted to the Covington Street Railway Company by the City of Covington and are of opinion that the period for which these routes were granted has expired, they therefore recommend that the City of Covington through some authorized committee or its City Clerk offer for sale for a period of 25 years to the highest and best bidder and conformable to the ordinance entitled, "An ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington," passed December 13, 1864, and as amended August 3d, 1865, by ordinance entitled, "An ordinance to amend an ordinance approved December 13, 1864, entitled, 'An ordinance prescribing the terms and conditions of street passenger railroads within the city of Covington.'"

(Here follows description of same routes as on pp. 29, 30, *supra.*)

Your Committee further recommend that the City Council before the time fixed for said sale select a person who shall act in conjunction with two others, one to be chosen by the owners of the R. R. property and the other to be chosen by the bidder of said property, whose

duty it shall be to value all the property of the owners of the railroads operating on the aforementioned routes.

(T. W. Sanford, H. Von Bokern, Henry Holtrup)
Special Committee.

(H. P. Whitaker, Joseph Hermes, William Blick)
Comtee. on Law.

Report concurred in and the following Special Committee appointed, viz: Messrs. Whitaker, Droege and Moser, who in connection with the City Solicitor are to take charge of the matter of advertising, etc.

ORDINANCE OF JANUARY 3, 1891. (R., 93.)

This ordinance granted the company the right to lay and maintain tracks to connect its Madison Avenue tracks with the car barn on the corner of State Street and Madison Avenue.

COMPROMISE ORDINANCE OF OCTOBER 7, 1892. (R., 96.)

Board of Council 3, page 155.

An Ordinance in Relation to The South Covington and Cincinnati Street Railway Company.

Section 1. *Be it Ordained by the Common Council of the City of Covington,* That in consideration of the South Covington and Cincinnati Street Railway Company within twenty days after the acceptance of this ordinance, reducing and maintaining during the term of the contract period herein provided for, a reduced cash fare of five cents, and no more, for one continuous ride upon its cars, from any point on its lines in the city of Covington, as

the said corporate limits now are, or may hereafter be extended, to Fourth St. or to Fountain Square in the City of Cincinnati, and from Fourth street or Fountain Square, in the City of Cincinnati, to any point upon its line in the City of Covington, as its corporate limits now are, or may hereafter be extended, it being understood that the said company shall carry passengers to Fountain Square, in the said City of Cincinnati, only in case it shall continue to operate its lines to said Fountain Square, otherwise to Fourth street, in Cincinnati, the transferring from one car or line to another car or line, shall be held to be a continuous ride, and said company shall transfer in accordance with the provisions of an ordinance of August 5th, 1889, that is, All lines running north and south shall transfer to those lines running east and west, and all lines running east and west shall transfer to those lines running north and south, and in consideration of the said company, within six months after the passage of this ordinance removing its tracks from Scott street, south of Fourth St. to the southern terminus of said track and putting said street back in as good condition as the rest of the street, and to the satisfaction of the common council, and double tracking Greenup street, from 2d to Powell, thence with a single track along what is known as the Austinburg extension around to 17th and Greenup; also a double track from Powell and Greenup south on Greenup to 17th St., except where the street is less than thirty-five feet in width in Patten's subdivision which distance shall have a single track, thence south from 17th and Greenup with a double track along Greenup to State, thence with a double track west on State street, to Madison Ave., and shall electrically equip and operate all those routes heretofore or hereafter named in this ordinance with modern electric

cars and appliances, and put back all streets where tracks are removed or laid in as good condition and with the same material as the rest of the street, and to the satisfaction of the common council and according to the direction of the city engineer. The double tracks on Greenup and State streets, are to be placed as near the center of said street as it is consistent with public safety and convenience, and in consideration of the said company, within ten months from the acceptance of this ordinance removing its tracks from Powell St., between Madison Ave. and Greenup St.; from 17th St., from Greenup to Scott, and from Banklick, from Pike to 15th St. and from 15th street, from Banklick to Russell, replacing said streets, in as good condition and with the same material as the rest of the said streets, and to the satisfaction of the common council; and in further consideration of the said company removing its tracks from Cooper street, between Madison Ave., and Scott street, and replacing said street, in as good condition as the rest of the street, and with the same material to the satisfaction of the common council and according to the direction of the city engineer; and in further consideration of the said street railway company releasing the said city of Covington from all claims for loss, expenses or damages by reason of the reconstruction of its tracks on the streets now being made with asphalt, the city of Covington does hereby agree for a period of twenty years from and after the date of the acceptance of this ordinance by said street railway company, that it will not offer for sale or sell, or attempt to sell, any of the rights, franchises, rights of way or privileges now held used or enjoyed by the said street railway company in the city of Covington and to that end the resolution passed by the city council of the City of Covington on the 11th and 18th

days of September, 1890, directing the sale of certain rights, is hereby withdrawn, and the suit now pending in the Circuit Court of the United States, for the Sixth Judicial District and District of Kentucky at Covington, to-wit: The South Covington and Cincinnati Street Railway Company, complainant, vs. The City of Covington, defendant, and the suit of W. A. Goodman, trustee, complainant, vs. The City of Covington, defendant, in the same court pending, shall be prosecuted to a final determination and judgment or judgments, which shall fix and determine the rights of the litigants; *provided, however,* that if the court in which the said suits are pending should, after the passage and acceptance of this ordinance, refuse to hear or try the issue of said cause or causes, or should dismiss the said causes without deciding the question at issue therein or trying said causes should decide the issue in favor of the city, then and in either of the said events, the city hereby agrees to postpone the enforcement of any of its claimed rights to sell any of the franchises of the said company for a period of twenty years from and after the acceptance of this ordinance, and during said period of twenty years it will not attempt to sell or offer to sell any of said franchises; and should said court decide against the city, or any court to which said question may come decide adversely to the city, then said company will not take or use any advantage of said decision until the expiration of the term of twenty years herein granted said company. It is distinctly understood and agreed by said city and said company that this ordinance shall be held and construed, to be only a compromise postponement of the assertion by the city of rights claimed by it, which rights are denied by the said company and are now the subject of litigation between the said city and the said company,

but it is distinctly understood and agreed by both said city and the said company, that said city and said company will, if the court in which said suits are now pending should hold that it has jurisdiction to hear and determine said suits, unite in asking said court to hear and determine said questions, notwithstanding the passage and acceptance of this ordinance, it being the purpose to have all questions between said city and said company determined in the court in which the said suits are now pending, if said court decides that it has jurisdiction to hear and determine same, in order that both parties hereto may know their respective rights at the end of said period of twenty years. It is further distinctly understood and agreed by said city and said company that nothing in this ordinance contained shall be held or construed to be any surrender or waiver of the rights of either said city or said company. It is further understood, and agreed by both the city of Covington and the said street railway company that neither the said city or said company by the passage and acceptance of this ordinance, in any way admits, waives, relinquishes, prejudices, or affects their respective rights, and claims as they respectively existed before the passage of this ordinance, so far as they relate to the matters involved in the said suits. The agreement between the said street railway company and the said city of Covington, as above provided is made upon the following terms and conditions and all of them, viz:

1. That the said South Covington and Cincinnati Street Railway Company shall, within twenty days after the acceptance of this ordinance, reduce the rate of fare for carrying passengers from any point on its line within the limits of the city of Covington, as the said corporate limits now are, or may hereafter be extended, to any

point on its line in the city of Cincinnati, as hereinbefore provided, or from any point on its line in the city of Cincinnati as hereinbefore provided, to any point on its lines within the corporate limits of the said city of Covington, as the corporate limits now are or may hereafter be extended, to a five-cent cash fare, and no more, for each passenger, and to maintain the said reduced rate of fare during the compromise period herein agreed upon, to-wit: Twenty years from and after the acceptance of this ordinance, and in consideration of the said reduced rates of fare between said cities of Covington and Cincinnati, the said street railway company may charge and collect a five-cent cash fare, and no more, for passengers riding on its line within the present or future corporate limits of the city of Covington.

2. It is the agreement by said company with the city of Covington that the five-cent fare shall apply to and extend over each and every line of street railway in the city of Covington, on and over which the cars of said company may run or be operated during the term herein granted, not only within the corporate limits of the city, but to and from Cincinnati.

3. The cars on Greenup street and Madison avenue shall be operated as a belt line over State street, so that the cars shall pass both ways on said streets.

4. The South Covington and Cincinnati Street Railway Company shall also run its cars out on the Lexington pike at least five hundred feet south of the intersection of the Pike and Twelfth streets within sixty days after the city gets possession of said pike, and the right is hereby given said company to so extend its line when the city has obtained control over said road.

5. The said street railway company shall, within six months after the passage of this ordinance, remove its

track from Scott street, south of Fourth street, and from Cooper street, between Madison avenue and Scott street, and shall connect its track on Pike street with the track of the said railway as now laid on Madison avenue, and Pike street, so that the cars of said company may pass to and from the tracks on Pike street, and Madison avenue, and shall double-track Greenup street, as above provided, and extend its single track along what is known as the Austinburg extension around to Seventeenth and Greenup; also a double track from Powell and Greenup south on Greenup to Seventeenth, except where the street is less than thirty-five feet in width, in Patton's subdivision, which distance shall have a single track, thence south from Seventeenth and Greenup with a double track along Greenup to State, thence with a double track west on State street to Madison avenue; and said company shall electrically equip and operate all these routes heretofore or hereafter named in this ordinance with modern electric cars and appliances within six months from the acceptance hereof, and shall daily run its Cincinnati cars at intervals not to exceed seven minutes from 6 A. M. to 5 P. M., and not to exceed five minutes from 5 P. M. to 8 P. M., and not to exceed ten minutes from 8 P. M. to midnight, and on all other lines cars to be operated not to exceed ten minutes apart; and said street railway company shall have the right to lay and maintain tracks so as to connect its present system of tracks at the corner of Madison avenue and Fourth street with the railway tracks to be constructed on and over the proposed new bridge over the Ohio river, the Covington end of said proposed new bridge being at Fourth street and Madison avenue, in the city of Covington, Ky.

6. The said street railway company shall, at its own expense, lay such foundation under its tracks, over which

cars are operated by electricity as aforesaid, as have been recently made under and along Madison avenue, from Fourth to State streets, and the work shall be done to the entire satisfaction of common council, and the said company shall put back any street from which its tracks are removed, or on which its tracks may be laid, in as good condition as the rest of the street. The city reserves the right to change the grade of the streets over which said railway routes are located, both as to curve and crown of the same, and the said railway company shall defray the expense, at any time the council may direct, of lowering or elevating such tracks so as to conform to the said change of grade, and place a foundation such as is hereinbefore provided for; and further, that said street railway company shall operate all its lines by electricity as a motive power, using no horses or mules, and all poles to be hereafter erected by said company shall be of iron or steel, both along the new routes, and also along the old, when new poles are needed, and so placed as not to interfere with or obstruct driveways. And the city of Covington expressly reserves the right and power to require all the wires of said company used overhead to be placed under ground at the expense of the company whenever deemed proper or expedient, and the South Covington and Cincinnati Street Railway Company also can, upon thirty days' notice in writing to the mayor of the city, put the said wires under ground whenever it so determines, unless sooner ordered by the city of Covington; and the said street railway company binds itself to replace all streets where the wires are put under ground at its own expense and to the satisfaction of common council. That from or after the period of five years from the acceptance of this ordinance by the street railway company, said company shall contract for and

adopt the best mode and manner of rapid transit, and the best way and manner then obtainable between the cities of Covington and Cincinnati, and through the city of Covington, it being understood that the said company shall then use the bridge or bridges between said cities which shall at the time afford the best facilities for rapid transit between Covington and Cincinnati; and if after the expiration of the period of five years there is no better mode of rapid transit between the cities of Covington and Cincinnati across the Ohio river, the said company or its successors or assigns shall as soon thereafter as a more rapid mode can be obtained adopt and use said mode. And whatever tracks along its routes in the city of Covington are not in operation, as herein provided, after a period of ten months from the passage of this ordinance, shall be removed at the expense of the street railway company, and the streets put back immediately, where said tracks have been removed and in as good condition as the rest of the street, and with the same material, and whatever portion of the routes that are not, after a period of ten months after the acceptance of this ordinance, equipped and operated in the said city of Covington with electricity, shall be forfeited to the said city of Covington.

7. That the said street railway company shall release the city of Covington from any and all claims for damages, loss or expense incurred by it for or on account of the said street railway company in removing or relaying its tracks on the streets in the city of Covington, now being or hereafter to be made with asphalt, under the provisions of a resolution passed by the common council of the said city on the fifteenth day of October, 1891, requiring said improvements to be made by said street railway company, and the said street railway company shall

continue to remove and relay its tracks and place the foundation as required, at its own expense, under and over the streets now ordered to be improved with asphalt, until the said work is completed.

SECTION 2.

In consideration of the said street railway company removing its tracks from Scott street, Powell street, Seventeenth street, Cooper street, Banklick street and Fifteenth street, and double tracking Greenup street and State streets, as hereinbefore provided, the said city of Covington agrees and covenants with the said South Covington and Cincinnati Street Railway Company, its successors and assigns, that it will not grant to any other company or companies, corporation or corporations, association or associations, individual or individuals, any right, privilege or franchise to lay, maintain or operate its street railroad or street railroad track, or any other system of passenger traffic, on or over the streets so abandoned without giving to the said street railway company the same rights and privileges that are enjoyed by any other company, corporation, association or individual on the said streets, or any of them; the terms of the joint use to be settled by arbitration, each party to select one, and those two a third party, who shall decide all differences. The city of Covington expressly reserves the right to exact a bonus or consideration from this company, as well as all others, for the use of such streets as are now abandoned by this ordinance, as well as for the use of all other streets that may be hereafter granted. The city reserves the right to permit any companies to cross the tracks of the said South Covington and Cincinnati Street Railway Company wherever located.

SECTION 3.

The said street railway company shall, upon notification from the mayor of Covington that the city is prepared to proceed with the improvement of State street, between Madison avenue and Greenup street, and Greenup street between Seventeenth and State streets, proceed immediately after said notification to lay the proper foundation under the tracks, and lay its tracks on State street, between Madison avenue and Greenup street, and Greenup between Seventeenth and State.

SECTION 4.

The terms and conditions of this ordinance shall be accepted in writing by the said South Covington and Cincinnati Street Railway Company within twenty days after the passage of this ordinance, and the said acceptance in writing shall constitute this ordinance a contract between the said street railway company and the city of Covington for the purpose herein provided.

SECTION 5.

If at any time the South Covington and Cincinnati Street Railway Company fails or refuses to comply with the terms and provisions, or any part thereof, of this ordinance, the common council can, upon twenty days' notice being given of such breach, order the tracks of the said company to be removed from the said streets which are named herein for its new tracks, and upon failure of said company to remove the same, the said city can remove them at the cost of said company, and the said city of Covington reserves the right to repeal this ordinance for any breach of the same after twenty days' no-

tice to the said company. It is understood and agreed that the rights obtained under this contract and ordinance can not be assigned or sublet without the consent first being obtained from the common council of said city of Covington.

SECTION 6.

The right to tear up the tracks, or have the same done, for the purpose of improving or repairing sewers or laying gas or water pipes, or repairing the same, or making house connections with the same, or making any improvements, or doing any work which necessitates the tearing up of tracks, or displacements of wire, or removing of poles, is reserved to said city, and may be exercised by it after a reasonable notice to said company, and the said company shall, at its own cost, replace said tracks, wires and poles.

SECTION 7.

The said street railway company shall, before this ordinance takes effect and before said company acquires any rights under this ordinance, file with the city clerk a bond, to be approved by the common council, with resident state sureties, in the sum of $25,000, that it will save the city harmless from any and all loss or damage or cost to persons or property by reason of the construction and operation of said railway, and also condition for the faithful performance and carrying out of all the provisions of this ordinance and the common council can at any time require new or additional sureties upon said bond, and the said bond shall at all times be subject to the approval of the common council, and the remedies secured to the city by this bond are additional to the other remedies in this ordinance to the city.

SECTION 8.

The said company shall dedicate to the city and open for public use for street purposes the south half of Sixteenth street, between Scott and Madison avenue.

SECTION 9.

The said company shall pay to the said city of Covington each year during the first five years of the period of this contract the sum of $2,600, and each year during the second period of five years of the period of this contract the sum of $4,000, and each year during the third five years of the period of this contract the sum of $5,000, and each year during the fourth five years of the period of this contract the sum of $6,000, which yearly payments shall be in lieu of any and all car licenses or bonus. These sums shall be paid one-half on the fifteenth day of June and one-half on the fifteenth day of December, in each year. The said street railway company shall, within ten months after the acceptance of this ordinance, electrically equip and operate what is known as the Third street route, beginning at Third street and Madison avenue, and extending west on Third street to Bullock street, and north on Bullock street to Second street; and the company shall extend its said line west on Second street, from Bullock to the west corporation line of said city, and to lay proper turnouts on said line as it is now constructed or may be extended, so as to permit and facilitate the running of cars in opposite direction on said line. And permission is given to said company to connect its tracks at Fourth and Main streets with the tracks to be laid on the bridge of the Covington and Cincinnati Elevated Railway and Transfer and Bridge Company.

SECTION 10.

In full settlement and satisfaction of all claims of the city of Covington against said company on account of unpaid car licenses and bonus arising prior to the year 1893, the said company shall pay the city of Covington the sum of $1,500 immediately after the acceptance of this ordinance.

SECTION 11.

All the cars operated on the Greenup, Madison and State street lines running over the river, shall be operated as follows:

One-half the cars on leaving the suspension bridge shall proceed south on Madison avenue, east on State street, and north on Greenup on over the river, the other half of the cars shall on leaving the bridge proceed south on Greenup to State, west on State to Madison, and north on Madison on over the river.

SECTION 12.

Before a double track is laid on State street, from Greenup to Madison, as hereinbefore provided, State street shall be widened between said points, at the expense of the company, to a width of not less than forty feet between the curbing, with an eleven-foot sidewalk on each side of said streets; provided, however, if the land necessarily required to widen said streets can not be purchased at just or reasonable prices, then said company must, within sixty days after the passage of this ordinance, produce to the common council of the city of Covington satisfactory evidence that it can not purchase sufficient ground at reasonable or just prices from

the owners of the same; then the city will proceed to condemn said land to widen said street, and when said land is condemned, the car company shall pay all costs and damage of acquiring said land by said condemnation proceedings; the street car company to have the right to lay, maintain and operate a single track on State street between Greenup and Madison streets, until State street is widened so as to permit the laying of a double track on said street.

SECTION 13.

Said company, instead of operating its Austinburg line as it is now operated, shall extend its track out Edward street to the corporation line, thence west along the corporation line to Garrard street, thence north on Garrard street to State street, thence west on State to Greenup street; provided, however, that the construction and operation of this line by said company shall operate as a surrender to the city of Seventeenth street, from Edward to Greenup; and provided, further, that every alternate car which passes over said line shall pass down and over Madison avenue; any failure to comply with this provision shall also be taken as a breach of this ordinance.

SECTION 14.

In case the right of franchise has not been settled by the courts at the end of the term of this ordinance, then said street car company shall continue to pay semi-annually, as above provided, the sum of $7,500 per year until said suits are finally determined; and further, that the said company binds itself that the reduced rates of

fare mentioned in this ordinance shall continue until said suits are settled.

Approved October 7, 1892. No. 942.

(The changes in tracks were made as provided. R., 142.)

ORDINANCE JULY 11, 1901, CHANGING TRACKS FROM GREENUP, SECOND AND SCOTT STREETS TO PARK PLACE AND COURT AVENUE. (R., 106.)

Board of Council 12, page 379 *et seq.* July 1, 1901.

An ordinance of the City of Covington authorizing the South Covington & Cincinnati Street Railway Company to change its tracks from certain streets to certain other streets in the City of Covington.

Be it Ordained by the General Council of the City of Covington that,

WHEREAS, The South Covington & Cincinnati Street Railway Company now occupies a portion of Second Street between Scott and Greenup Streets, and Greenup Street between Second Street and Park Place, and Scott Street between Second Street and Park Place, and operates thereon a Street Railway, its tracks on said street connecting the tracks upon the Suspension Bridge with the various routes operated by said South Covington & Cincinnati Street Railway Company; and

WHEREAS, The City of Covington has requested that the said Street Railway Company should change its tracks and the operation of its Street Railway from said portion of said streets to Court Street, and Park Place, all as more fully set forth herein; and

WHEREAS, Said City of Covington desires to widen Court Street on the east side thereof between Third Street and Park Place, and the said South Covington & Cincinnati Street Railway Company is willing to give to said City a strip of land twelve feet deep along said eastern side of Court Street between Third Street and Park Place, from land owned by said South Covington & Cincinnati Street Railway Company; and

WHEREAS, In the opinion of the Council, the said change of tracks from the streets first above specified to Court Street and Park Place, will be for the benefit of said City and the convenience of its citizens, and of the traveling public;

Now, Therefore, Be it ordained by the General Council of the City of Covington:

SECTION 1.

That the South Covington & Cincinnati Street Railway Company is hereby granted the right of way, and is authorized and empowered to lay double tracks and to construct, operate and maintain its street railway from the tracks on the Suspension Bridge over and across Second Street at the angle, to the center of Court Street, thence along and over the center of Court Street to Third Street, and across Third Street and over Court Street as widened, as hereinafter set forth, to Park Place on a straight line with its tracks on Court Street, between Second Street and Third Street, and single or double tracks over and upon Park Place between Scott and Greenup Streets; and said South Covington & Cincinnati Street Railway Company is hereby authorized and granted the right of way to lay such curves, frogs, switches, and cross-overs as are necessary and proper

in its judgment to connect said Suspension Bridge tracks with the tracks of Court Street, and to connect the tracks on Court Street with the track or tracks on Third Street, and with the track or tracks on Park Place, also to connect its track or tracks on Park Place with its tracks on Scott Street and Greenup Street, and such other curves, frogs, switches, cross-overs and other rails or appliances as may be necessary and proper in its judgment to the full use and enjoyment of the rights herein granted; also to erect the poles and string the wires on and over said streets, which may be necessary or advantageous to the use of said right of way, and to the operation of said Street Railway, as hereinabove set forth.

SECTION 2.

The said South Covington & Cincinnati Street Railway Company is to commence the work of laying said tracks within a period of four (4) months from the date hereof, unless prevented therefrom by the said City of Covington or by delay in the improvement of said Court Street and Park Place; and said company further agrees within a reasonable time after the completion and operation of its tracks, as above set forth, to remove its present tracks on Greenup Street between Park Place and Second Street, on Second Street between Greenup Street and the Suspension Bridge, also on Second Street between the Suspension Bridge and Scott Street, also on Scott Street between Second Street and Park Place, and on Third Street between Court Street and Greenup Street; and said streets shall be put by said Company in as good condition and order as they now are under the direction of the City Engineer of the City of Covington.

SECTION 3.

It is hereby ordained and agreed on the part of the City of Covington that the right of way over said streets from which the tracks are to be removed, as herein set forth, and the right to construct, operate and maintain a street railway, or to lay its tracks thereon, or to construct, operate and maintain any other system of passenger traffic on and over said streets, shall not at any time hereafter be granted to any other person or corporation than the South Covington & Cincinnati Street Railway Company. In the event that the said City of Covington shall hereafter attempt to authorize any other person or corporation to occupy and use said streets, or any part thereof from which the tracks are to be removed, for street railway purposes or for the construction, operation and maintenance of any system of passenger traffic, then the said South Covington & Cincinnati Street Railway Company shall have and regain the same rights to use said streets, that it now possesses under existing laws and ordinances.

In the event that, for any reason, the rights herein granted to said South Covington & Cincinnati Street Railway Company in the first section hereof, shall be taken from said The South Covington & Cincinnati Street Railway Company, or said Company shall be prevented in any manner from exercising said rights, or in the event that said Company shall fail for any reason to effectually obtain said rights, it shall retain and possess in every respect the rights which it now has over and upon the streets mentioned in Section Two (2) hereof and the land conveyed by it to said City, as set forth in the next section hereof, shall immediately revert to it

The South Covington & Cincinnati Street Railway Company.

SECTION 4.

The rights herein granted to said Street Railway Company are granted in consideration of the benefits to the City of Covington as hereinabove set forth, and otherwise, and in consideration of the conveyance by the said South Covington & Cincinnati Street Railway Company of a strip of land on the east side of Court Street between Third Street and Park Place, fronting one hundred (100) feet on Court Street and being twelve (12) feet in depth, which shall be dedicated and deeded to the said City of Covington for said purposes for the widening of Court Street, after the passage of this ordinance, said land to revert to said South Covington and Cincinnati Street Railway Company upon the condition set forth in the preceding section hereof.

SECTION 5.

The rights and obligations of said City of Covington and the said South Covington & Cincinnati Street Railway Company shall be the same as to the streets mentioned in Section One (1) hereof as they now are with reference to the sereets mentioned in Section Two (2) hereof, under the laws and ordinances now in force relating thereto.

SECTION 6.

The said South Covington & Cincinnati Street Railway Company shall accept this ordinance in writing within thirty (30) days from its passage.

SECTION 7.

This ordinance shall take effect and be in force from and after its passage and approval by the Mayor.

Passed by the Board of Aldermen June 20th, 1901.

Passed by the Board of Councilmen July 1st, 1901.

Approved this 11th day of July, 1901.

W. A. JOHNSON, *Mayor.*

(This grant was sustained by the Court of Appeals of Kentucky, 137 Ky., 512.)

APPENDIX II.

CHARTER AND ORDINANCES OF THE COVINGTON STREET RAILWAY COMPANY.

NOTE: Appellee claims nothing under this charter and these ordinances. They are presented for the examination of court on the contention of the appellant, the City of Covington, denied by appellee, that the Abbott grant of Dec. 23, 1869, was limited to twenty-five years by the terms of the ordinance of December 15, 1864, *infra.*

CHARTER OF COVINGTON STREET RAILWAY COMPANY—FEBRUARY 9, 1864. (R., 37.)

An Act

To Incorporate the Covington Street Railway Company.

Be it Enacted by the General Assembly of the Comonwealth of Kentucky:

Section One. That N. C. Morse, Amos Shinkle, Jesse Wilcox, J. C. Sayres, John F. Fisk and M. M. Benton

and their associates, be, and are hereby created a body politic and corporate, under the name of The Covington Street Railway Company, with perpetual succession, and by that name may contract and be contracted with, sue and be sued in all courts, and shall have a capital stock of $250,000.00, divided into shares of one hundred dollars each to be subscribed as hereinafter provided.

Section Two. The persons named in the first section of this act, or any three of them, shall be the commissioners to receive subscriptions to the stock of the company, and to superintend the first election of directors; and before receiving any subscription, they shall give two weeks' notice thereof in some newspaper, circulating in the city of Covington, of the time and place of opening the books. Five dollars per share shall be paid by the subscribers before the first election of directors, and when the election shall have taken place, said commissioners shall hand over to the directors all the papers and books in their hands belonging to the company, and also pay over the money received in subscription. That so soon as seventy-five thousand dollars shall have been subscribed if the books have been opened one week, the commissioners may hold said election, and no subscription shall be deemed valid until the advance payment shall have been made.

Section Three. There shall be elected five directors of said company, all of whom must be stockholders, and after the first election, they must have held the stock for at least three months previous to the election. The annual elections of the company shall be on the first Saturday in January in each year, unless a different time shall be fixed by the Board of Directors, and those in office shall hold over if an election should fail, until an election shall take place; at said election stockholders shall

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be allowed one vote on each share held three months, and upon which all calls shall have been paid: *Provided*, no stockholder shall have more than one hundred votes, nor shall any vote, while delinquent in the payment of calls on the stock.

Section Four. The directors shall elect one of their body president, who shall possess the usual duties of presidents of like corporations. The president and directors shall constitute one board for the transaction of business; may ordain and establish the necessary by-laws for the government of the company and its employees; appoint a secretary and treasurer who may also be of the board, and such other officers as they may deem proper, and take from them their requisite bonds for the performance of official duties. They shall require payments on the stock of not more than five per centum per month till the whole shall have been paid, and if any call shall not be paid for one month after the same shall be due, the delinquent shall pay one per centum per month interest thereafter until payment, and the company may proceed to collect the said call by suit, or may forfeit the stock; in which case the payments that have been made shall enure to the benefit of the company. At least thirty days' notice shall be given before any forfeiture shall be declared, either in newspaper as before mentioned, or by personal service.

Section Five. The business of this corporation shall be to construct and use railways along the streets of Covington, and in the suburbs of said city. It may construct the lines along said streets, either with single or double track as they may consider beneficial to the interest of the company, and to which the City Council of said city may consent, authority for which is hereby given to said Council to make an agreement therefor;

and out of said city into the surrounding country, and along such turnpike roads as may be agreed with the turnpike companies. It may also construct tracks across the Covington and Cincinnati Bridge, by the consent and agreement of said companies, and may make connections with such other street railway as may be deemed advantageous and proper, and may have branches and district lines, and may construct and purchase cars and other equipments for said roads.

Section Six. That when said company shall have constructed a line upon any of the streets of said city, the city authorities shall not grant a right to any other company so long as this company shall use the same and comply with the terms and conditions of the grant. The Board of Directors may re-open the books of subscriptions to capital stock of the company and prescribe the terms of payment, and if necessary the capital stock may be increased by the stockholders at any regular or called meeting for that purpose, and in either case due notice shall be given to the stockholders, that such proposition will be made. Said board shall also determine the rates to be charged upon said roads.

Section Seven. The said corporation may borrow money upon the credit thereof to an amount not exceeding its capital stock at a rate not greater than ten per centum per annum, and may execute bonds therefor of not less denomination than one hundred dollars, and to secure the payment thereof by any pledge or mortgage of the property and income of the company.

Section Eight. That the company may purchase and hold such real and personal estate as may be considered necessary in the transaction of its business, and sell and convey the same whenever its interests may so require.

Section Nine. That any person who shall willfully place any obstruction by stones, logs, sticks, or other thing on the track of said company, or shall tear up or remove any part or portion of the track or the works thereof with the intent to obstruct the cars in passing thereon, or to throw them off the track, or shall burn or destroy any building belonging to said company, he shall be confined in the penitentiary not less than one or more than five years. That for the injury or destruction of any of the property of said company the person or persons found guilty thereof shall be deemed guilty of a misdemeanor and subject to a fine of not less than fifty or more than five hundred dollars, or imprisonment in the county jail not to exceed six months, or both.

Section Ten. In no case shall this corporation exercise any banking privileges.

Section Eleven. The General Assembly reserves the right to change, amend or repeal this act.

Section Twelve. This act shall take effect from its passage.

Approved February 9th, 1864.

Council Proceedings Leading up to Ordinance of December 15, 1864, and the Contract With the Covington Street Railway Company.

(R. 39 *et seq.*)

Book F Council Proceedings, page 587.

Meeting November 10, 1864.

Same (Shinkle) presented a petition from the incorporators of a street railroad with the charter and route of said road. Referred to a select committee consisting of Messrs. Shinkle, Shutt, Arnold, Bard and Condell, to report at next meeting of the board.

(See R. 39-42 for application and routes.)

Book F. page 592. December 1st, 1864.

Same (Shinkle) presented a report on the petition of the incorporators of a street railroad. On motion of Mr. Rose it was resolved that when the Council adjourn, it adjourn until next Monday night at seven o'clock to consider the above report.

Book F, page 593. December 5th, 1864.

Mr. Shinkle from special committee to whom was referred the charter and petition of the incorporators of a street railroad company reported in favor of granting the prayer of the petitioners with the exception of that portion of Madison Street route running from Madison on Pike to Washington Streets. As a substitute the committee recommended that the petitioners be granted the right-of-way over Sixth Street from Madison to Washington Street, then on Washington to Pike Street, to the line first designated. On motion the report was concurred in and the Committee on Law in conjunction with the City Attorney was instructed to report an ordinance granting the Street Railway Company the franchise asked for in their petition agreeable to the report of the Committee.

Book F, page 598. December 15, 1864.

Mr. Condell, chairman on Committee of Law, to whom was referred the report (petition) on the Street Railroad with instructions to report an ordinance, reported an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington, which had its first reading, when on motion the Council resolved itself into a Committee of the Whole,

Mr. Shutt in the Chair, for the purpose of considering the above ordinance. The Committee arose and through their chairman reported that they had examined the ordinance carefully and adopted it section by section and asked for your concurrence and adoption. On motion the report of the committee was received and adopted and the ordinance was read the third time and adopted unanimously, as follows:

"An Ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington.

SECTION 1ST. Be it ordained by the City Council of Covington that any company organized for the purpose of laying down rails for running street passenger cars to be drawn by horses, or mules, through the streets of Covington, shall be guided, governed and regulated by the following conditions and such restrictions as council may hereafter pass.

SECTION 2ND. No company shall be permitted to lay down a track through any of the streets of said city without first obtaining the consent of the City Council, designate the company to whom the privilege is granted, and the streets through which said line shall pass.

SECTION 3RD. All tracks laid shall be of the gauge of five feet and two inches, and of the most approved rail, which shall be not less than four inches tram, and not more than three-quarter inches flange, the same to be laid according to the direction of the City Council, and in such manner as to be no impediment to the ordinary travel, and use of the streets, with suitable bridges at all the gutters, so as to permit the flow of water under the same, and such grades as are or may be hereafter established by the City Council. Any company to whom any privilege may be granted, shall first enter into a good and

sufficient bond in the penal sum of fifty thousand ($50,000.00) dollars with the city, said bond to be drawn by the city attorney and to be endorsed by not less than five responsible freeholders and residents of the city as sureties to keep the streets between the rails in as good repair as the balance of the street, to the satisfaction of the City Council, and also that no motive power, except horses and mules, shall be used upon any street, and if any company or individual to whom any privilege shall be granted, shall fail to keep that portion of the street occupied by their track in good and sufficient repair, or shall refuse to pay into the city treasury the amount of tax or license fixed by council for the privilege of using, as required by this section, the City Council shall have the right to prevent the use of said street or streets by removing the rails therefrom.

SECTION 4TH. And upon the further condition that any company or individual to whom any privilege may be granted shall place and continue upon said streets good cars, with all the modern improvements for comfort and convenience to passengers, and that they run cars thereon as often as the public convenience may require.

SECTION 5TH. And provided any such company or individual shall not charge more than five (5) cents for each passenger on each route.

SECTION 6TH. And provided that no company or individual, to whom any privilege may be granted, shall assign or transfer their franchise in said road or roads, without first obtaining the consent of the City Council thereto.

SECTION 7TH. And provided further, that the City of Covington shall not be held liable to any company or individual for the breakage of any sewer, gas or water pipe, or from any delay in the transportation of passen-

gers, that may be caused by the making of sewers or culverts, or laying of water or gas pipes or the necessary repairing of same or from any other delay or damage that may be caused by fire or otherwise. But any such company or individual shall be liable for any loss or injury that any person may sustain, by reason of any carelessness, neglect or misconduct of their agents or servants in the management, construction or use of said track or street, and an such company or individual shall indemnify and hold the city harmless from any damage that may be claimed by property holders or by any person, or persons, on account of laying said track, or in the use, or by reason thereof, or by running the cars thereon.

SECTION 8TH. Provided any company or individual to whom privilege may be granted, as aforesaid, shall within fifteen days after the award granting such privilege, come forward and sign the proper contract agreeing to abide by these stipulations, and agreeing further to complete, and put in operation, and have cars running thereon, not less than two and a half miles of road, within twenty-four months after signing the necessary obligations, contract and stiplations as required by this ordinance.

SECTION 9TH. And be it further ordained, that the following specifications regulating the running of street railroads in Covington, be required of any company or individual, taking out license under the provisions of this ordinance, viz:

1. No cars shall be drawn at a greater speed than six (6) miles an hour.

2. While the cars are turning the corners from one street to another, the horses or mules shall not be driven faster than a walk.

3. No cars shall be allowed to stop on a crosswalk, nor in front of any intersecting street, except to avoid collision, or to prevent danger to persons in the streets.

4. When the conductor of any car is required to stop at the intersection of streets, to receive or leave passengers, the car shall be stopped so as to leave the rear platform slightly over the crossing.

5. The conductors and drivers of each car shall keep a vigilant watch for all teams, carriages, persons on foot and especially children, either on the track or moving toward it, and on the first appearance of danger to such teams or persons, or other obstruction, the car shall be stopped in the shortest time and space possible.

6. The conductor shall not allow ladies and children to enter or leave the car while in motion.

7. Conductors shall announce to the passengers the names of the streets as the cars pass.

8. The cars after sunset shall be provided with signal lights.

9. The cars shall be entitled to the track, and any vehicle upon the track of said company shall turn out when any cars come up, so as to leave the track unobstructed, when requested by the driver of any car.

10. Provided that if any person or persons shall have cause to remove any iron safe or other large and heavy substance, they shall be allowed sufficient time to load and unload the same, without being liable or amenable for such obstruction.

SECTION 10TH. Be it further ordained, the franchise for street railroads as provided for in this ordinance and according to the plan of roads, as laid down in the schedule of the incorporators of The Covington Street Railroad Company, presented to this board with their petition now on file in the city clerk's office, be granted to

any responsible company, who will pay into the city treasury of Covington, the largest bonus for the same, and to the incorporators any expense they may have incurred in making a survey of the routes above referred to, together with the maps and estimates, not exceeding $100.

SECTION 11TH. Be it further ordained, that the city clerk be instructed to advertise in the Cincinnati Gazette, Commercial and Times, and one paper in Pittsburgh and in Philadelphia, until February 1st, that sealed proposals will be received up to the first of February next for the franchise above named, and that the same will be awarded to the highest and best bidder, at the first meeting of council thereafter.

It being understood that the present incorporators propose to transfer their rights and privileges, in and to the charter obtained by them for a street railroad in this city to the company or individual offering the largest bonus for the above mentioned franchise.

SECTION 12TH. Be it further ordained that the company to whom this franchise is granted, may have the privilege of repairing the streets between the rails by bouldering when they may wish to do so.

SECTION 13TH. This ordinance shall continue and be in force from and after its passage. All contracts made under the provisions of this ordinance, shall be for the term and period of twenty-five years.

Passsed by the following vote. (Unanimous.)

On motion the Clerk was instructed to advertise the above ordinance in the Volksblatt, Times and Saturday Evening American.

ADVERTISEMENT CINCINNATI DAILY TIMES JANUARY 4, 1865. (R., 36.)

"To Capitalists.

The Legislature of Kentucky having incorporated the Covington Street Railway Company, the city Council of Covington, Ky., on the 15th day of December, 1864, passed an ordinance prescribing the terms upon which the City will grant the right of way and upon what streets the road may run, and offered the franchise to any responsible company who will pay into the City Treasury of Covington the largest bonus for the same, and to the incorporators any expense they may have incurred in making a survey of the routes above referred to together with the maps and estimates not exceeding $100.

Sealed proposals will be received at the City Clerk's Office up to February 1st, 1865. The ordinance above mentioned can be had at this office.

H. E. WILSON,
City Clerk of Covington.

Covington, Ky., December 29, 1864.
(Inserted from December 29 to February 1st.)

ACCEPTANCE OF BID, FEBRUARY 23, 1865. (R., 48.)

Book F, p. 615. Council Meeting, February 23, 1865.

Same (Mr. Arnold) presented the proposals for constructing and running a street railroad in the city, which were opened and read, and on motion the bid of Thos. Sherlock and Malcolm McDonald and their associates was accepted by the following vote: Yeas—Mr. Shutt, Assmann, Arnold, Andrew, Bowen, Fallis, Karper, Hove-

kamp, Knoll, Maurer, Shinkle, Taylor, Reed. No. They proposing to pay into the City Treasury the sum of $250 per year as a bonus, also proposing to pay the expenses incurred by the incorporators of said company, in making a survey, etc., not exceeding One Hundred Dollars. The Committee on Law in conjunction with the city attorney was instructed to take bonds for the performance of the contract.

COUNCIL PROCEEDINGS RELATIVE TO AMENDMENT OF ORDINANCE AND AMENDMENT, AUGUST 3, 1865. (R., 49.)

Book F, page 666. July 27th, 1865.

Same (Bowen) presented a memorial from Thomas Sherlock and others, the Covington Street Railway Company, asking Council to pass a resolution or ordinance to be inserted and made part of the contract for the safety of both parties in the construction of the street railway. Referred to the Committee on Law in conjunction with the City Attorney to report an ordinance at their discretion.

Book F, page 673. AUGUST 3d, 1865.

Mr. Bowen reported the following ordinance which was read and the yeas and nays being called was passed as follows:

An Ordinance to Amend an Ordinance approved December 15th, 1864, entitled An Ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington.

Section 1. Be it Ordained by the City Council of Covington that the ordinance be amended as follows: The license fee for each car shall be the highest price now fixed,

or that the City Council from time to time may fix, not exceeding ten dollars, to be paid for license for a hack, omnibus, or other vehicle of like capacity as a car.

Section 2. At the expiration of the period of twenty-five years the City Council shall again offer the same routes, or these routes with other bounds added to any or all of them, to the highest and best bidder, and if any person or persons, or company or incorporation shall make a better bid than the present Covington Street Railway Company, such bid shall be accepted, only upon the condition that the successful bidders will take from the then owners of the roads, in Covington, and pay said owners, or arrange to pay them, therefor, to the satisfaction of said owners, all the property of every kind belonging to said owners, upon and pertaining to the then existing routes; providing the owners thereof can and will deliver the same free from incumbrance, at a valuation to be fixed by three disinterested and sworn parties, or by a majority of them, to be selected, one by the City Council of Covington, one by the owners, and one by the bidder; but should said bidder or said owners, or both, fail or refuse, within ten days after the acceptance of the bid, to select a valuer, then the City Council shall select the omitted valuer or valuers: and should said bidder fail or refuse to take and pay for said property, or fail to arrange to pay for same, as aforesaid, within twenty days after the return of the valuation of the City Council, then the owners of the road shall be entitled to take the bid; provided the City Council shall have the right to reject all the bids and offer the routes again, but upon the principles above set forth.

Provided, also, that the present company shall be entitled to continue to run the road, upon the then existing conditions, until a new bid has been accepted.

Section 3. The contract between the city and the present company shall contain the above stipulation and conditions.

COUNCIL PROCEEDINGS ACCEPTING CONTRACT AND BOND NOVEMBER 30, 1865. (R., 51.)

Book F, page 711. November 30, 1865.

Same (Bowen) presented the following bond and contract of the Covington Street Railway Company which was received and accepted.

(Bond is dated August 16th, 1865.)

Same presented the agreement between Covington Street Railway Company and the City of Covington which was accepted and the following resolution adopted.

Resolved, that the President of the City Council be authorized to sign the contract with the Covington Street Railway Company and affix the seal of the city thereto and that the contract be accepted and spread upon the records of the city and the original be filed away.

AGREEMENT DATED AUGUST 15, 1865. (R., 51.)

Articles of Agreement made and entered into this 15th day of August, 1865, by and between the City of Covington and The Covington Street Railway Company.

WITNESSETH: That whereas, the city council of said city, by resolution passed on the 23d day of February, 1865, accepted the bid and proposals of Thomas Sherlock and Malcolm McDowell and their associates, for constructing and operating a street railroad in said city; and whereas, the said Sherlock and McDowell, and their

associates are the owners of the stock and franchises of the said Covington Street Railway Company, and have assigned and transferred their rights and interests under said accepted proposal to said company; and therefore, in consideration of the premises, the said city of Covington doth hereby grant to the said Covington Street Railway Company permission to construct and operate railways upon the terms and conditions contained in an ordinance of said city council, passed on the 15th day of December, 1864, entitled 'An ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington,' and amendment thereto, dated August 3, 1865, and the provisions of the charter of said city, and the charter of said railway company; and in pursuance thereof on the following streets of said city, or upon such of said streets, alleys or public grounds as the city may have control of, or condemned for public uses, as the city council, with consent of said company, may designate. It is understood that the city does not grant the absolute right of way on Madison street, from Twelfth to the corporation line, but she does grant the right to use the same as far as she has control over it.

The turn-outs may be changed from one street to another, and to different points on the same street, by and with the consent of both parties, hereto first had and obtained.

The routes at present designated, as follows:

GREENUP STREET ROUTE, OR No. 1.

Commencing corner of Scott and Front, running south to Third, east on Third to Greenup, south on Greenup to Powell, east on Powell to Madison, returning over the

same route to Third street; continuing north on Greenup to Second, west on Second to Scott, to same place of starting; to be a single track route, with turn-outs at following intersections of streets with Greenup: Third, Fifth, Seventh, Eleventh, Thirteenth and Powell.

Madison Street Route, or No. 2.

Commencing corner Scott and Front, running south on Scott to Third, west on Third to Madison, south on Madison to corporation line, a double track on Madison from Eighth to Third; turn-outs at the following intersections of streets with Madison: Robbins, Twelfth, Fourteenth and Fifteenth streets.

Pike and Banklick Street Route, or No. 3.

Running over the Madison street route to Sixth street, west on Sixth to Washington, south on Washington to Pike, west on Pike to Banklick, south on Banklick to Fifteenth street, east on Fifteenth street to Madison, a double track on Pike from Banklick to Washington, on Washington to Sixth and on Sixth to Madison, and turn-outs at the following intersections of streets with Banklick: Eleventh, Thirteenth and Fifteenth streets.

Main Street Route, or No. 4.

Running over that portion of the Madison street route from the corner of Front and Scott to Third and Madison, west on Third to Main, south on Main to Pike, west

on Pike to York, a single track with turn-outs at the following intersections of streets: Third and Johnson, Third and Main, Fifth and Main, Seventh and Main, Riddle and Main, Pike and Main, Pike and York; returning over the same route.

THIRD STREET ROUTE, OR NO. 5.

Running over the Main street route to Main, west on Third to Bullock, south on Bullock to Second, returning over the same route, single track, with turn-outs at the intersections of the following streets with Third: Philadelphia and Bullock.

And the said Covington Street Railway Company, for the privilege herein granted, agrees and binds itself to pay at the end of each and every year, during a period of twenty-five years, the sum of two hundred and fifty dollars; and to perform all the provisions, requirements and conditions of said ordinance, and amendments and the charter of said city, and such other orders and ordinances as the general welfare and experience may seem to require, and as may be adopted and ordained by the city council in reference to said railway company, and binding upon its part to be performed or upon the operator of said railway and the lessees of the above mentioned routes under said ordinance and amendment and others that may hereafter be ordained. All the provisions of said ordinance and said amendment are hereby by reference made part thereof as fully and with the same binding force as if the same were inserted herein at length.

The said company shall keep in repair all the crossings and intersections used by them; and it is further stipu-

lated that said company shall build and put into complete operation two miles of said road within thirty months from and after the 9th day of March, 1865, and that said company shall construct its road with rails having a tram of not less than four inches in width and a flange of not more than three-fourths of an inch in height, and a gauge of what is known as five feet two inches. This contract shall continue in force for a period of twenty-five years from its date.

This contract shall take effect and be in force and binding upon the parties hereto on and after the 9th day of March, 1865.

In Witness Whereof, The said city of Covington, by its president, under the seal of said city, has affixed its signature, and the said Covington Street Railway Company has caused its corporate seal to be affixed hereto and attested by its president and secretary the day and year first above written.

MAPS

TOO

LARGE

FOR

FILMING

16

Office Supreme Court, U. S.
FILED
MAR 19 1918
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 225.

THE CITY OF COVINGTON, APPELLANT,

vs.

THE SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO., APPELLEE.

REJOINDER OF APPELLEE TO APPELLANT'S REPLY BRIEF.

In his reply brief the City Solicitor has cited several additional cases upon which we desire to make comment.

In Davis *vs.* The Mayor, &c., of N. Y., 14 N. Y., 506 (1856), the Court of Appeals held that the Common Council of New York City, which had power to "regulate" its streets, did not thereby have the power to authorize the construction and operation of a street railway on Broadway; this was based on the view that such operation was not a proper street use. The court expressly stated, however, that such view was not entertained by the Court of Appeals of Kentucky. The court said (page 518), referring to several cases:

"In none of these adjudications, with the exception of the one in the Court of Appeals of Kentucky, has the position which I am opposing been affirmed in a case requiring its determination, etc." * * * "It has been laid down in the case in Kentucky * * * that the laying a railroad on a street or highway is only a new and improved method of making use of the public easement over the lands dedicated or appropriated, pursuant to law, for a street or highway."

The Kentucky case referred to is Lexington & Ohio R. R. *vs.* Applegate, 8 Dana, 289 (1839), where the Court of Appeals held that the Mayor and Council of Louisville, which had title to and control of its streets, had the power to grant the railway the right to operate on Main street.

Counsel seeks to distinguish this case as follows: "We conclude that the court based its opinion not on the general powers of the city under its charter, but on the authority conferred on such city by the special act of the legislature incorporating the railroad company."

We do not find any basis in the opinion for such a distinction. The report does not show, and we do not find, any such special authority in the act of incorporation. The court's reference to the city's title to its streets, and the extensive discussion of what is a proper street use, preclude the idea that the decision was based on any express legislative authority.

Wolfe *vs.* Lexington & Covington R. R. Co., 15 B. Monroe, 404 (1854), referred to in our main brief (page 14), cited the Applegate case with approval, and refers to the grant in that case as having rested for its authority on the municipal action. So in the Wolfe case itself, it does not appear that the charter of the railway or any other legislation gave Covington express power to make the grant which was upheld.

Milhau *vs.* Sharp, 27 N. Y., 611 (1863), follows Davis *vs.* The Mayor, etc., 14 N. Y., 506, which, as we have seen, was confessedly contrary to the Kentucky doctrine.

In Cumberland Telephone and Telegraph Co. *vs.* Avritt, 120 Ky., 35, cited by this court in the Owensboro case (230 U. S., on page 68), the court referred to its long line of decisions holding that the operation of a steam or street railway is a proper street use, and applying them to the telephone question there involved, said:

"We are unable to distinguish a telephone line from a steam railway or an electric railway on the public highway."

This case was cited by the Kentucky Court of Appeals in Jackson, etc., Telephone Co. *vs.* Hazard, 143 Ky., 149, 150, as authority for the proposition that control of the highway gave the fiscal court power to grant a telephone franchise thereon, even though it resulted in some obstruction of the highway (230 U. S., page 67).

Peoples' Railroad *vs.* Memphis Railroad, 10 Wall., 38 (1869), followed Davis *vs.* The Mayor, 14 N. Y., 514 (*supra*), and so far, at least, as Kentucky is concerned, must be regarded as having been superseded by the Owensboro case (230 U. S., 67 *et seq.*).

All of this question about the original powers of the city of Covington to make any grant seems to us to be immaterial in view of the city's repeated recognition of the Abbott grant in the hands of the successive corporations which owned it, and to whom the city had express power to make or confirm the grant; also in view of the fact that the city has never before, not even in its answer in this case, denied its power to make the Abbott grant.

All of which is respectfully submitted.

RICHARD P. ERNST,
ALFRED C. CASSATT,
FRANK W. COTTLE,
Counsel for Appellee.

CITY OF COVINGTON *v.* SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 225. Argued March 19, 20, 1918.—Decided April 15, 1918.

A grant of "all the right and authority" that a city "has the capacity to grant" to construct, hold and operate a street railroad on designated streets, without a hint of limitation as to time, is a grant in perpetuity if the city has authority to grant perpetually.

An ordinance entitled "an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington," providing for proposals and a contract to be made with the best bidder respecting specific routes, and declaring that "all contracts made under the provisions of this ordinance shall be for the term

and period of twenty-five years," *held* not to be addressed to the scope of future ordinances, and not to limit the term, otherwise perpetual, of a franchise for other routes granted by a later ordinance.

One street railroad company held a perpetual ordinance franchise, and another a limited one with but eight years to run with the right, however, at expiration to secure a new franchise or compensation for its property. An ordinance, entitled as granting the right of way to the first company over the streets held by the second, authorized the first to contract for the second's right and to "occupy and use" such streets "subject to the conditions, limitations and restrictions" contained in the ordinances regulating the first company's rights in the streets it already occupied, but, as a condition, obliged the first company to give up part of its line which would be but imperfectly supplied by the new rights even if they were perpetual. *Held*, that the ordinance granted a perpetual franchise to the first company, and was not merely a consent that it acquire the right of the second.

Where not otherwise construed by the state court, legislation vesting the streets in a city, and giving its authorities exclusive control over them and its council exclusive power to establish and regulate all sidewalks, streets, alleys, lanes, spaces and commons of the city, is to be taken as empowering the city to grant street railroad franchises in perpetuity. *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58.

A street railroad is one of the ordinary incidents of a city and with respect to the municipal granting power stands on a different footing from steam railroads habitually run over separate rights of way.

Affirmed.

THE case is stated in the opinion.

Mr. A. E. Stricklett for appellant.

Mr. Alfred C. Cassatt, with whom *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the briefs, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellee to restrain the City of Covington from carrying out an ordi-

nance of July 14, 1913, that provides for the grant of a twenty-year franchise for a street railway over certain streets to the best bidder. The plaintiff claims a right by grant and contract over the same streets, which will be interfered with, and sets up Article I, § 10, and the Fourteenth Amendment of the Constitution. The defendant says that the plaintiff's grant has expired, and that if it purports to be perpetual it was beyond the power of the city. These are the two propositions argued. The District Court granted the injunction as prayed and the city appealed.

We will consider first the scope of the ordinances and contract under which the plaintiff makes its claim. On January 21, 1870, Edward F. Abbott, S. J. Redgate and their associates were incorporated, with perpetual succession, as the Covington and Cincinnati Street Railway Company, with power to construct railways in the City of Covington along such streets as the council might grant the right of way to, and along such roads out of the city as the companies owning the roads might cede the right to use. The company was authorized to purchase and hold such routes and railway tracks as might be deemed necessary for its use, and to connect with and use the tracks of other railways in the vicinity upon equitable terms. Just before their incorporation, on December 13, 1869, an ordinance was passed by the city granting, according to the terms of a contract executed on December 23, 1869, to Abbott and Redgate, "their associates, successors and assigns," "all the right and authority that [the city had] the capacity to grant, to construct, hold and operate a street railroad upon and along" the streets named. The only provision for a termination of the rights conveyed was in case of a failure of the grantees to keep their covenants. On December 28, 1874, an ordinance was passed extending the time for completing the work under the Abbott contract,

renewing the terms of the same but somewhat changing the route, and on January 28, 1875, another authorized an extension to a suspension bridge across the Ohio. On May 1, 1875, Abbott and his associates conveyed all their rights under the foregoing ordinances and contract to the corporation that they had formed, and the title of the corporation was recognized by an ordinance of June 24, 1875. On January 25, 1876, Abbott and others were incorporated with perpetual succession as The South Covington and Cincinnati Street Railway Company, the appellee, with substantially the same powers that were granted to the Covington and Cincinnati Company, and on December 20, 1876, the last-named corporation conveyed its rights to the appellee. The latter has whatever rights were acquired by Abbott, as was recognized by an ordinance of October 13, 1881.

As there is no hint at any limitation of time in the grant to Abbott, and on the other hand the city grants all the right and authority that it has the capacity to grant, there can be no question that the words taken by themselves purport a grant in perpetuity more strongly than those held to have that effect in *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58. The fact chiefly relied upon to narrow their operation is found in the terms of "an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington" passed on December 15, 1864, before the dealings with Abbott. By § 13 "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years." It is contended that this by implication governs later transactions. But there is little ground for even an argument upon the point. The ordinance is providing for proposals and a contract with the best bidder, concerning routes contemplated by a rival of the Covington and Cincinnati, the Covington Street Railway Company incorporated on February 9,

1864 (afterwards bought up by the appellee). The contracts referred to in § 13 are primarily at least contracts of those who should acquire the franchises offered, such as in fact were made. In no sense is the Abbott contract a contract under that ordinance. It was a contract under the ordinance of 1869, which established its substance and even its form. The ordinance of 1864 did not address itself to the construction or scope of future ordinances, but only of certain contracts of which Abbott's was not one. We regard the matter as too plain to be pursued into greater detail. This part of our decision covers all the grants to Abbott including the right to lay tracks to the suspension bridge.

There were extensions of the plaintiff's rights by acts of the legislature of March 13, and April 5, 1878, in general terms that there seems to be no reason for supposing more limited in time than the original grant. See § 3. The only part of this branch of the case needing further discussion concerns the rights acquired by the plaintiff through the purchase of its rival's, the Covington Street Railway's, lines. This company, under the ordinance of 1864 that we have mentioned got a franchise limited to twenty-five years, but with provisions that there should be a new bid after that time and that the successful bidder, if other than the Covington Street Railway Company, should purchase its property upon a valuation. It did not lose the value of that property by the ending of its right of use. On June 8, 1882, the plaintiff, already having a general authority by its charter, was authorized by "an ordinance granting the right of way over certain streets . . . to" the plaintiff, to contract with the Covington Street Railway Company for the right of way held by the latter and to occupy and use the streets specified in the contract of that road with the city, "subject to the conditions, limitations and restrictions contained in the ordinances regulating its [the plaintiff's] right to

the streets now occupied by the said South Covington and Cincinnati Street Railway Company." This grant was on condition that the plaintiff should remove the tracks by which it connected with the suspension bridge under the ordinance of January 28, 1875, and give up its rights to the same, which as we have said were rights in fee. It got other access to the bridge over the Covington Street Railway line, but we agree with the district judge that it is not to be supposed that it would give up its perpetual right for a franchise having eight years to run over a less convenient route, so far as this part of its purchase was concerned. We agree also that the language of the ordinance conveys more than a license to purchase what the vendor had. The title and the operative words import a grant and the reference to the ordinances regulating the plaintiff's right in the streets adopts as the measure these, not the contract with the selling road. The ordinance was followed by the contemplated contract in July, 1882. Some further grants need no special mention. We are of opinion that the plaintiff's right in this part of its system also is a right in fee.

The question of the power of the city to grant a perpetual franchise needs but few words. By statute the streets were "vested in the city" and the authorities of the city were given "exclusive control over the same" and in another section the council was given "exclusive power to establish and regulate . . . all sidewalks, streets, alleys, lanes, spaces and commons of the city." Acts 1849–1850, c. 237, §§ 2, 19, p. 239. No decision of the state court is brought to our attention that calls for any hesitation in following the authority of *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, and pronouncing the authority complete. *Wolfe* v. *Covington & Lexington Railroad*, 15 B. Monr. 404. A street railroad is one of the ordinary incidents of a city

street and stands on a different footing from the steam roads habitually run over separate rights of way. See also Act of March 13, 1878, c. 423, and Act of April 5, 1878, c. 813, §§ 1, 3.

Decree affirmed.

MR. JUSTICE CLARKE, dissenting.

I have so recently stated my reasons for not concurring in opinions which seemed to me, by inference and construction, to raise limited, into perpetual, grants of rights in city streets, that I shall not repeat them here (*Owensboro* v. *Owensboro Water Works Co.*, 243 U. S. 166, 174; *Northern Ohio Traction & Light Co.* v. *Ohio*, 245 U. S. 574), but shall confine myself to a brief statement of the facts and conclusions of law which lead me to dissent from the court's opinion in this case.

The opinion of the court begins with the grant to Abbott, et al., in December, 1869, but in my judgment that grant cannot be correctly interpreted without beginning five years earlier, in 1864, with an ordinance passed by the city, which is general in its terms and is described in the record of council as "an ordinance defining the obligations of any company or individual to whom privilege may be granted to use the streets of the city for street passenger railroad purposes." It is entitled, "An ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington." This ordinance contained these provisions: "This ordinance shall continue and be in force from and after its passage. All contracts under the provisions of this ordinance shall be for the term and period of twenty-five years." And so far as the record shows it has never been repealed.

Pursuant to the terms of this general ordinance, a contract was entered into as of March 9, 1865, with the Covington Street Railway Company, giving it the right to

operate a street railway on designated streets, again "for a period of twenty-five years from its date."

More than four years later, on May 13, 1869, Abbott and others made an application to the council for a franchise and the company holding the prior grant, which was then operating a railway, protested against the making of a grant to Abbott, and warned the city that it claimed the right to operate on all its streets and that another grant could not lawfully be made.

But at the meeting at which this protest was filed, without any special authority from the legislature, this grant was made to Abbott. It is from the language of this grant that the court derives a perpetual franchise, and it reads:

"Be it ordained by the City Council of Covington that all the authority and right that the City of Covington has the capacity to, be and the same is hereby granted to E. F. Abbott [*et al.*] . . . to construct, hold and operate a street railroad," upon designated streets.

I cannot bring myself to think that this is the language men would use who were intending to grant perpetual rights in city streets, but rather it seems to be the cautious describing of what the councilmen thought a doubtful right under a doubtful remnant of authority, remaining after the grant to the other company which was threatening litigation if this further grant were made, and that they thought it subject to the limitation of twenty-five years in the general ordinance of 1864. And be it noted that this grant, made without special authority from the legislature, is dated December 13, 1869; that the Covington & Cincinnati Street Railway Company, the predecessor of the appellee, was not chartered for more than a year after the date of this grant to Abbott, from which all the rights of the appellee are claimed to flow; and that it did not acquire the grant

until 1875 in which year the first construction work was done under it.

Some twenty years after the grant to Abbott the City of Covington granted, this time to the Cincinnati, Covington & Rosedale Company, a franchise which was expressly limited to fifty years and which, recognizing that the general ordinance of December 15, 1864, was still effective, required that the grantee should conform to all the requirements of that ordinance "except in so far as the same has been repealed."

In the street railroad case of *Louisville City Ry. Co.* v. *City of Louisville*, 8 Bush, 415, the Court of Appeals of Kentucky, construing the charter of the City of Louisville, granting jurisdiction over streets, in scope, not less than that granted by the Covington charter, declared: "Under the general legislative power of the municipal government to control and regulate the use of the streets of the city, it could not grant to any person or corporation the right to lay down a railway in a street. . . . The right of the general council to contract with the railway company *grows out of the special acts of the legislature* heretofore quoted."

Whether this statement was necessary to the decision of the case then under consideration or not, in the following year it was paraphrased and adopted in a *Covington Street Railway Co.* case [*Covington Street Ry. Co.* v. *Covington*] 9 Bush, 127, and, almost twenty years after that, it was again approved in a *Covington* case, [*Bateman* v. *Covington*] 90 Kentucky, 390.

Thus, during the entire period covered by the grants here involved, it was the law of the State, as its highest court understood and announced it, that the City of Covington did not have, under its charter, power to make a street railway grant, *without special authority so to do from the legislature.*

That this was also the opinion of the legislature of the

State and of that part of the bar of the State concerned with the grants here involved is conclusively shown by the fact that in the charter of every one of the three street railway companies concerned herein there is *a special grant of power to the City of Covington* to make the contemplated contract for the use of its streets for street railway purposes.

This obscurely worded grant, thus made to Abbott without special legislative authority, is not helped out by subsequent recognition by the city, for we find the parties, almost from the beginning of its term, dealing with each other constantly at arm's length, the city claiming that the grant was, at most, limited to twenty-five years, and the Railway Company claiming it to be perpetual.

For instance, as early as 1887, when the right to use electric power was granted, a typical provision was inserted in the ordinance, accepted in writing by the company, "that nothing in this ordinance shall be construed to, nor shall it give to, said railway any further or longer time than it now has to operate its lines."

Again, in 1892, for a reduction of fare and other considerations the city agrees "for the period of twenty years after the date of the acceptance of this ordinance" not to offer for sale any of the rights or franchises of the appellee in the said streets; and it was not until after the expiration of this period that the proposition to grant a new franchise was made, which the decision of the court permanently enjoins.

This is sufficient of detail to indicate why I am of opinion that the meager and equivocal grant of 1869 should not be regarded as helped out by the subsequent dealings of the assignees of it with the city.

Under the circumstances thus presented, with limited franchises granted before and after this grant to individuals, but never one unlimited in terms, with the city contending always that this franchise was for twenty-

five years only, and with the courts, legislature and bar of the State united in thinking that there was no power in the municipality to make even a limited street railroad grant without special legislative warrant, I cannot bring myself to consent to construe, as the court does, an obscurely worded clause of a single sentence, found in a grant to individuals, of the right to construct an insignificant horse railroad, which the son of the grantee in an affidavit alleges required an expenditure of only $48,000, so as to impose upon the municipality "the unspeakable burden" of a perpetual franchise to operate street railroads in its streets.

Fully realizing the futility, for the present, of dissenting from what seems to me to be an unfortunate extension of the doctrine of the *Owensboro Case*, 230 U. S. 58, I deem it my duty to record my dissent, with the hope for a return to the sound, but now seemingly neglected, doctrine of *Blair* v. *Chicago*, 201 U. S. 400, 463, declaring that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred "*in plain terms*," "*in express terms*" and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation "*which can claim nothing which is not clearly given.*" The reason given by the court for this rule is, that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

Believing that the application of this wise rule to the decree before us must result in its reversal, I dissent from the opinion of the court.

MR. JUSTICE BRANDEIS concurs in this dissent.